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IN THE

Supreme Court of the United States

October Term, 1957.

No. 990

NATIONAL BISCUIT COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States.

October Term, 1957

No.

NATIONAL BISCUIT COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellant, National Biscuit Company, appeals from the judgment of the Supreme Court of Pennsylvania, entered on January 2, 1958, sustaining the inclusion of U. S. securities in the computation of a state tax imposed on foreign corporations; and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

A. OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania are reported in 390 Pa. 642, 136 A. 2d 821 (November 11, 1957). Two opinions were handed down, both affirming the court below and sustaining the tax. Mr. Justice Cohen did not participate. One opinion of three justices, written by Justice Chidsey, sustained the tax as a privilege tax and at the same time retained in effect prior decisions holding the same tax to be a property tax. The concurring opinion

of the other three justices, written by Justice Bell, agreed that the tax is a privilege tax but would overrule prior decisions which had held the same tax to be a property tax. For convenience the two opinions are referred to hereinafter as the Chidsey Opinion and the Bell Opinion, respectively. These two opinions and the judgment of the state court are printed in Appendix B. The result of these opinions was to include appellant's investments in U. S. securities in the tax computation under the privilege tax theory and to leave in force and effect decisions of the state court holding the same tax to be a property tax.

The opinion of the trial court, Common Pleas of Dauphin County, Pennsylvania, dated April 12, 1956, containing its findings of fact, conclusions of law and judgment, is reported in 69 Dauphin County Reporter 35; and the opinion of that court en banc, sur exceptions filed, has not been reported. Both opinions are included at pages 133a and 156a of the printed Pennsylvania supreme court Record (hereinafter referred to as "R") filed herewith; and the first seventeen paragraphs of the Stipulation of Facts, incorporated in the trial court's opinion by reference, are also printed therein at pages 45a-50a.

The majority and dissenting opinions of the state court in a related case involving appellant (*National Biscuit Company v. Philadelphia*), in which the majority held the "Franchise" tax to be a property tax, are reported at 374 Pa. 604, 98 A. 2d 182 (1953) and relevant portions thereof are printed in Appendix D.

B. JURISDICTION.

The grounds, including the essential facts, on which the jurisdiction of this Court is invoked are:

(i) This action was brought by a foreign corporation under Section 1104 of the Fiscal Code of Pennsylvania, 72 Purdon's Statutes, § 1104, as an appeal from a tax imposed on foreign corporations under Sections 20 and 21(b)

of the Pennsylvania Act of June 1, 1889, P. L. 420, as amended, 72 Purdon's Statutes, §§ 1901 and 1871, to challenge, inter alia, the inclusion of U. S. securities in the capital stock value used as the basis of the tax. The nature of the tax is at issue, but for convenience it will sometimes be referred to herein as the "Franchise" tax.

(ii) The judgment of the Supreme Court of Pennsylvania was entered November 11, 1957, but did not become final for purpose of this appeal until January 2, 1958, when appellant's Petition for Reargument was denied.[1] Notice of appeal was filed on March 17, 1958, in the Supreme Court of Pennsylvania.

(iii) The statutory provisions conferring jurisdiction of the appeal on the Supreme Court of the United States are to be found in 28 U. S. C. §§ 1257(2), 2103, and 1257(3).

(iv) The following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment on appeal in this case:

Questions 1 and 3.

New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey, 338 U. S. 665, 70 S. Ct. 413 (1949).

Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143, 75 S. Ct. 607 (1955).

Question 2.

Schuylkill Trust Co. v. Pennsylvania, 315 Pa. 429, 173 A. 309, reversed, 296 U. S. 113, 56 S. Ct. 31 (1935).

Schuylkill Trust Co. v. Pennsylvania, 327 Pa. 127, 193 A. 638, affirmed, 302 U. S. 506, 58 S. Ct. 295 (1938).

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1. Said petition was timely filed on December 2, 1957, under an extension granted by the Supreme Court of Pennsylvania on November 19, 1957. See Appendix C, p. 50.

Question 4.

Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U. S. 226, 233-34, 17 S. Ct. 581 (1897).

Santiago v. People of Puerto Rico, (C. C. A. First Circuit) 154 F. 2d 811 (1946).

STATE STATUTE INVOLVED.

(v) The validity of the following Pennsylvania statute, as construed by the Supreme Court of Pennsylvania, is involved: Act of June 1, 1889, P. L. 420, Secs. 20 and 21, as amended by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last ones relevant hereto being the Acts of May 16, 1945, P. L. 606 and of May 29, 1951, P. L. 462, 72 Purdon's Statutes, §§ 1871 and 1901. The text of said Sections is set forth verbatim in Appendix A.

C. QUESTIONS PRESENTED.

1. Where the inclusion of U. S. securities in the computation of a state tax * imposed on appellant, a foreign corporation, for the year 1952, depends on whether the tax is a property tax or an excise tax for the privilege of doing business, can the state court in the present case, without violating the Credit Clause of the U. S. Constitution (Art. I, Sec. 8(2)) and Revised Statutes, § 3701, 31 U. S. C. § 742, uphold the inclusion of U. S. Securities on the ground that the tax is an excise tax and in the *same* case reaffirm other decisions of the *same* court holding that the *same* tax is a property tax for the purpose of determining *other exemptions* required by state law?

2. Are the appellant and its investments in U. S. securities discriminated against in violation of the Credit and Equal Protection Clauses (U. S. Const. Art. I, § 8(2) and XIV Amend.), when exemption for such investments is

* Imposed by Sec. 21(b) of the Pennsylvania Act of June 1, 1889, P. L. 420, as amended, the last relevant amending statute being the Act of May 29, 1951, P. L. 462, 72 Purdon's Statutes, § 1871.

allowed to domestic corporations for the purpose of the Capital Stock tax, a property tax, and similar exemption is denied to appellant by the state court for purposes of the so-called "Franchise" tax * in disregard of its other decisions holding that the "Franchise" tax is the equivalent of the Capital Stock tax?

3. In view of the conflicting decisions of the state court, concurrently in effect, as to the nature of the tax, is the tax * in substance and reality a property tax and therefore improperly imposed on appellant's investments in U. S. securities in violation of Revised Statutes, § 3701, 31 U. S. C. § 742, and Art. I, Sec. 8, Clause 2 of the U. S. Constitution?

4. Is the decision in this case, holding the tax * to be an excise tax, but at the same time reaffirming prior decisions (the latest one decided against the present taxpayer) holding the same tax to be a property tax, so arbitrary and unreasonable as to violate Due Process? (U. S. Const. XIV Amend.)

D. STATEMENT OF THE CASE.

(1) The Statute.

For nearly half a century prior to 1935, Section 20 of the Act of 1889, as amended, required domestic corporations and foreign corporations doing business in Pennsylvania to file annual tax reports and Section 21 imposed tax on "the actual value in cash" of their capital stock. This value was based upon the statutory tests of average selling price of shares on the market, earnings and dividends, and actual value of assets considering indebtedness, which tests were extended by judicial construction to in-

* Imposed by Sec. 21(b) of the Pennsylvania Act of June 1, 1889, P. L. 420, as amended, the last relevant amending statute being the Act of May 29, 1951, P. L. 462, 72 Purdon's Statutes, § 1871.

clude all factors having any bearing on value.[2] This tax was held to be a tax on property and assets—that on domestic corporations being a tax on all non-exempt property,[3] and that on foreign corporations being a tax only on *tangible* property located and employed in Pennsylvania.[4]

In the Amendatory Act of 1935 and subsequent amendatory acts, it is stated in the Title that a "Franchise" tax is imposed on foreign corporations in lieu of the capital stock tax theretofore imposed. Section 21(a) continues the tax unchanged on the capital stock of domestic corporations. Section 21(b) imposes on foreign corporations the so-called "Franchise" tax on the "taxable value" determined by ascertaining "the actual value in cash" of their whole capital stock *as theretofore* and by applying thereto certain allocation fractions known as tangible property, wages and gross receipts fractions. See Sections 20 and 21, as amended, Appendix A.

(2) History of the Case.

Appellant is a New Jersey corporation doing business in Pennsylvania and other states. During 1952, the tax year involved, its principal office was located at 449 West Fourteenth Street, New York City, where its principal officers performed their duties, and its executive, administrative and financial activities, including management and control, were centered. There, it also held, managed and controlled investments of $26,300,000 in U. S. securities.

Appellant, as a foreign corporation, is subject to tax imposed by Section 21(b) of the 1935 and subsequent amendatory acts. That section having been held in several decisions of the Supreme Court of Pennsylvania to impose

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2. *Com. v. Pennsylvania Railroad Co.*, 297 Pa. 308, 147 A. 242 (1929).

3. *Delaware, Lackawanna and Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

4. *Com. v. Standard Oil Co.*, 101 Pa. 119 (1882).

a privilege tax,[5] appellant filed its 1952 tax return in March, 1953 (R. 46a) under that tax theory and in its self-assessment and payment of tax, it included its investments in U. S. securities in the "actual value in cash" of its capital stock. The apportionment formula applied thereto produced the "taxable value" which necessarily was made up in part of said U. S. securities to the extent of $1,648,265.45, thereby resulting in an additional tax of $8,241.33 attributable to the U. S. securities.[5a]

Subsequently, the City of Philadelphia imposed a so-called mercantile license tax on appellant, based upon its gross receipts, under an enabling act known as the Sterling Act (Act of August 5, 1932, Spec. Sess., P. L. 45, 53 Purdon's Statutes §4613) which by its terms prohibited the city from taxing any subject or privilege taxed by the state. Appellant challenged the local tax on the ground that it was an excise tax imposed on the privilege of doing business which constituted prohibited duplicate taxation of the state "Franchise" tax under the Act of 1889, as amended. On appeal by the city from a decision favorable to the appellant, the Supreme Court of Pennsylvania (two justices dissenting) reversed the lower court and held that the city tax is an excise tax, whereas the state tax is a property tax, so that the nature of each tax was different and, therefore, the city tax was valid under the enabling act: *National Biscuit Co. v. Philadelphia,* 374 Pa. 604, 98 A. 2d 182, (June 26, 1953). Relevant parts of the majority and

5. *Com. v. Columbia Gas & Electric Corporation,* 336 Pa. 209, 217, 8 A. 2d 404, 410 (1939); *Com. v. Ford Motor Co.,* 350 Pa. 236, 238, 38 A. 2d 329, 331 (1944) appeal dismissed, 324 U. S. 827; *Com. v. Quaker Oats Co.,* 350 Pa. 253, 256, 38 A. 2d 325, 327 (1944) appeal dismissed, 324 U. S. 827, 65 S. Ct. 857; *Com. v. Monessen Amusement Co.,* 352 Pa. 120, 42 A. 2d 158 (1945).

5a. Several issues were presented in the court below, but it was stipulated that if the court should adopt the theory that only U. S. securities should be excluded, then the record would be reopened to enable the court to enter judgment in the proper amount, which we have computed as above. Para. 18, R. 57a, 58a. Also see Appendix B herein at page 42, footnote 3.

dissenting opinions in that case, of the Sterling Act, and of the local ordinance, are printed in Appendix D herein.

Thereafter, the tax officials of Pennsylvania in November 1953 (R. 13a-15a) made formal assessment of "Franchise" tax against appellant on the theory that the tax was a privilege and not a property tax, thereby including appellant's investments in U. S. securities in the tax measure and tax computation. Thereupon, by appropriate proceedings in the present litigation, appellant protested the tax assessment and sought refund in the nature of a credit of that portion of the tax imposed on its investments in U. S. securities contending that if, as the State Supreme Court held in the *Philadelphia* case, the state tax is a property tax on corporate assets, then it could not be validly imposed upon U. S. securities.

Appellant also relied throughout the present litigation upon three other prior decisions of the State Supreme Court: the one[6] holding flatly that the "Franchise" tax is a property tax, and the other two[7] holding that the "Franchise" tax is the equivalent of the Capital Stock tax, admittedly a property tax, so that property taxation under a local ordinance or other state tax statutes of the shares or the income of foreign corporations constituted invalid double taxation of corporate property and assets already subjected to property taxation under the "Franchise" tax.

In the Supreme Court of Pennsylvania in the present case, the Chidsey Opinion (Appendix B, pp. 30-46), rejected this argument on the ground that the "Franchise" tax on foreign corporations is an excise tax for the privilege of doing business and, therefore, could be constitutionally measured by total capital stock value including U. S. securities. However, this Opinion refused to overrule prior

6. *Murray v. Philadelphia*, 364 Pa. 157, 174, 71 A. 2d 280 (1950).

7. *Com. v. Union Trust Company of Pittsburgh*, 345 Pa. 298, 307, 27 A. 2d 15, 19 (1942); *Arrott's Estate*, 322 Pa. 367, 373, 185 A. 697, 699 (1936).

decisons of the state court holding the same tax to be a property tax, with the attempted explanation that the state was not a party (although it actually was in the *Union Trust* case) to the cases in which it was held that the tax is a property tax and, further, that the tax could be regarded as a property tax for some purposes and in some contexts, without jeopardizing its holding that the tax is an excise tax for the purpose of taxing U. S. securities. The Chidsey Opinion also brushed aside as obiter dictum the court's unqualified statement in the *Philadelphia* case that the tax here involved is a property tax. The other opinion of three justices, the Bell Opinion (Appendix B, pp. 46-49) held that the two positions were fundamentally inconsistent and that the property tax decisions should be overruled. The Bell Opinion stated that the attempted explanation in the Chidsey Opinion that the court had consistently held the "Franchise" tax to be an excise tax "flies in the teeth of the more recent opinions and decisions of this Court which as above demonstrated held expressly, squarely and specifically to the contrary" (Appendix B, p. 48) and further: "How this Court can one moment say that a tax imposed by a certain State Act is a property tax, and the next moment say that it is a franchise tax, or vice versa, is to me incomprehensible; how this Court can then say that all the flatly contradictory and irreconcilable decisions of this Court on this point are harmonious and reconcilable, is to me incomprehensible; and finally, how this Court can reach its present conclusion (that the State franchise tax is a franchise tax, with which I agree) without overruling *National Biscuit Company v. Philadelphia,* 374 Pa., *supra,* and the recent cases which say exactly the opposite, is likewise incomprehensible" (Appendix B, p. 49).

Appellant's contention that these inconsistent decisions in and by themselves burden and discriminate against U. S. securities was rejected in the Chidsey Opinion on the ground that the tax was a privilege tax regardless of the court's

decisions in other cases that the tax was a property tax (Appendix B, pp. 33-43). The Bell Opinion was silent on this point. However, Justice Bell had expressed his views as to the use of different tests in different situations to determine the nature of the "Franchise" tax in his dissenting opinion in the *Philadelphia* case where he said (374 Pa. at p. 639, 98 A. 2d at p. 198; Appendix D, p. 75):

> "The effect of the majority opinion will, in my judgment, open wide the door to many taxes which have heretofore been held invalid and *will make meaningless and nullify many of the provisions of the Constitution.* For example, if the Constitution or a statute prohibits the taxing of a particular subject, all a municipality *or a legislature* has to do is to call the tax a mercantile license tax or an excise tax and then measure it by the prohibited subject. *Could anything show more clearly the basic weakness of the majority opinion or the dire results which can flow therefrom?*" (Emphasis supplied.)

Appellant's contention that the inconsistent decisions of the state court as to the nature of the tax violated appellant's constitutional rights of Due Process was rejected in the Chidsey Opinion on the ground that appellant had been given a hearing and the state court could change its decisions which had held the tax to be a property tax (Appendix B, pp. 45-46).

Appellant's Petition for Reargument, printed in Appendix C at pp. 50-61, which summarized its contentions as the result of the state court's decision and the divergent views of the justices thereof, was refused on January 2, 1958 without opinion; hence this appeal.

(3) How the Federal Questions Were Raised.

a. From the beginning of this litigation, the appellant has challenged the inclusion of U. S. securities in the tax base on the ground that, despite its being called a "Fran-

chise Tax," the tax here imposed is a property tax under the latest decisions of the state court and any decision, holding differently in this case without overruling contrary prior decisions, would violate the Borrowing, Equal Protection and Due Process Clauses of the Federal Constitution. This position of appellant was specifically maintained as follows:

(i) In its Appeal and Specification of Objections filed in the Court of Common Pleas of Dauphin County, Paragraphs 14(1), 14(2)(a),(b),(c) and (d), 14(3)(a), (b)—(R. 7a-10a).

(ii) In its Request for Conclusions of Law Nos. 7-11 filed with the trial court (R. 129a-130a), which were refused (R. 139a).

(iii) In its exceptions Nos. 6, 7, 8, 20-31 to the judgment nisi of the trial court (R. 142a, 143a, 149a-153a) which were dismissed by the trial court (R. 156a).

b. In its brief before the Supreme Court of Pennsylvania in the present case, the Questions Involved were stated as follows:

"1. Is the so-called Pennsylvania Franchise tax in reality a property tax and, therefore, improperly imposed upon Appellant's investments in (a) United States securities and (b) intangible or tangible property located or having a legal situs outside of Pennsylvania?

* * *

"2. Is the Franchise Tax 'equivalent' to a tax on property as such, so that in any event Appellant's investments in United States securities must be excluded from the computation of the tax?

* * *

"3. Does the Franchise Tax settlement discriminate against Appellant?

* * *

"4. If the tax, as-settled against Appellant, should be sustained in the litigation, will such judicial determination be so contrary to the decision of the Supreme Court of Pennsylvania in *National Biscuit Company v. Philadelphia,* 374 Pa. 604, involving the same taxpayer, that it will subject Appellant to taxation by arbitrary judicial action under two mutually exclusive constructions of the taxing statute, in violation of the State and Federal Constitutions?"

c. In its Petition for Reargument filed in the Supreme Court of Pennsylvania in the present case appellant summarized the grounds of its Petition as follows:

"I. By reaffirming the Court's prior decisions in *National Biscuit Co. v Philadelphia* and other cases relied upon by Appellant, the majority in effect holds that the so-called franchise tax is still a property tax for some purposes and in some contexts. This is enough to make the tax settlement invalid as applied to Federal securities owned by Appellant.

A. The inconsistent Opinions of the Court as to the nature of the franchise tax violate the immunity of Appellant's investment in United States securities from State taxation.

B. Discrimination against Appellant's investment in United States securities results from the Court's decision.

"II. The fact that the majority felt impelled to sustain the case of *National Biscuit Co. v. Philadelphia* shows that the Court was mistaken as to the single nature of the tax and the validity of including out of state assets comprised in part of United States securities.

"III. The concurring opinion of the minority Justices clearly shows that the majority opinion is mis-

taken as to the issue decided in *National Biscuit Co. v. Philadelphia,* and is still refusing to adjudicate consistently the nature of the franchise tax; and, therefore, is guilty of an abuse of judicial power, in violation of due process."

At each of the above stages of the litigation, the Court in its opinion, reached conclusions of law adverse to appellant's contentions. No issues of fact were involved.

E. FEDERAL QUESTIONS ARE SUBSTANTIAL.

This appeal presents a novel situation. In an opinion, which three justices describe as "incomprehensible" and which the editors of a national tax service describe as "a heads-we-win—tails-you-lose ruling," [8] the state court is concurrently enforcing conflicting decisions holding that the state tax based upon actual value of capital stock, is both a privilege tax (cases cited Note 5) and a property tax (cases cited Notes 6 and 7). Under the privilege tax theory, the tax is measured by the capital stock value and the incidence of the tax is on the privilege of doing business. Under the property tax theory, the incidence of the tax is on capital stock value representing corporate property and assets. When, in the instant case, appellant invokes the property tax decisions and theory, the state court adopts the privilege tax theory to include appellant's investments in U. S. securities in the tax computation; but three of the justices, questioning the constitutionality of enforcing conflicting state court decisions as to the nature of the tax, would overrule the property tax decisions.

Thus, this appeal raises serious and substantial Federal questions as to whether the conflicting state court decisions impinge on Federal sovereignty in respect to its credit and borrowing powers, burden and discriminate against U. S. securities, and violate appellant's constitutional rights un-

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der Equal Protection and Due Process, and whether the tax is in reality a property tax.

(1) The Conflicting State Court Decisions Per Se Impinge on Federal Sovereignty.

These decisions are utterly lacking in logic and violate the fundamental principles distinguishing a privilege tax from a property tax. The "Franchise" tax is either one or the other; it cannot be both. As pointed out in the Bell Opinion in the present case, the conflicting decisions cannot be harmonized on the ground that the state is a party in some cases and not in others. The nature of the tax is not changed by the identity of the parties litigant. Basically, the real party in interest here is the United States, whose obligations are being subjected to tax.

The state court adopts either the privilege or the property tax theory as to the nature of the tax to meet the exigencies of the particular case. Not only the application but, also, the mere assertion, of the naked, arbitrary judicial power to change the nature of the tax at will, ignores "the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit" [9] and constitutes an interpretation of the tax statute by the state court intended "to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign" [10]—all of which impinges on Federal sovereignty in respect to credit and borrowing power. So long as the state court, in the instant case and in the case of foreign corporations generally, interprets the tax statute as imposing a privilege tax, thereby subjecting U. S. obligations to taxation, and asserts also that the same tax is a property

9. *Smith v. Davis*, 323 U. S. 111, 117, 65 S. Ct. 157 (1944).

10. *Kern-Limerick Inc. v. Scurlock*, 347 U. S. 110, 121, 74 S. Ct. 403 (1954).

tax, such decision violates the immunity of U. S. securities from state taxation.[11]

(2) The Conflicting State Court Decisions Discriminate Against Appellant and Its Investment in U. S. Securities.

Discrimination against appellant and its investments in U. S. securities, in violation of Equal Protection Clause (XIV Amend.) and Credit Clause (Art. 1, Sec. 8 (2)) of the U. S. Constitution, arises in the present case under these circumstances:

a. If, for the purpose of determining whether a tax under a local ordinance duplicates the "Franchise" tax, the latter is held to be a property tax,[12] or, if for the purpose of exempting shares of foreign corporations from tax under other state tax statutes in order to avoid double taxation, the "Franchise" tax is held to be the equivalent of the capital stock tax,[13] the state court cannot arbitrarily take a *different* view in the present case for the purpose of denying the immunity of appellant's investments in U. S. securities from state taxation.

b. Exemption from capital stock tax is allowed for U. S. securities owned by domestic corporations (R. 48a, 49a), but the state court refuses to apply its decisions holding that the "Franchise" tax is the equivalent of the capital stock tax and to allow a similar exemption for U. S. securities owned by appellant and other foreign corporations.

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11. *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey*, 338 U. S. 665, 70 S. Ct. 413 (1949); *Society for Savings in the City of Cleveland v. Bowers*, 349 U. S. 143, 75 S. Ct. 607 (1955).

12. *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 98 A. 2d 182 (1953).

13. *Com. v. Union Trust Company of Pittsburgh*, 345 Pa. 298, 27 A. 2d 15 (1942); *Arrott's Estate*, 322 Pa. 367, 185 A. 697 (1936).

The state court decision in the present case, rejecting appellant's contention as to discrimination, was based upon its earlier decisions holding the "Franchise" tax to be a privilege tax (cases cited Note 5) which were prior in point of time to its later decisions holding the same tax to be a property tax (cases cited Notes 6 and 7).

This Court has affirmed or decided that U. S. securities have been discriminated against when the State exempts, even from a "privilege" tax, interest from municipal obligations and denies a similar exemption to interest from U. S. securities;[14] when for purposes of tax on bank shares, exemption is allowed for certain bank investments and a similar exemption is denied for the bank's investment in U. S. securities;[15] and when, in computing tax on shares of state trust companies exemption is allowed for investment in U. S. securities and other investments and a similar exemption is denied to national banks for investments in U. S. securities in the computation of tax on their shares under a different state tax statute.[16] These decisions support our contention of discrimination in the present case.

(3) The "Franchise" Tax in Reality Is a Property Tax.

Where the state court cannot reach a settled conclusion involving the construction of a state statute, this Court has said in *Gelpcke v. City of Dubuque*, 68 U. S. 175 (1863) at page 205:

> "It cannot be expected that this Court will follow every such oscillation from whatever cause arising that may possibly occur."

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14. *Com. v. Curtis Publishing Co.*, 363 Pa. 299, 69 A. 2d 410 cert. den., 339 U. S. 928, 70 S. Ct. 627 (1950).

15. *Schuylkill Trust Co. v. Pennsylvania*, 315 Pa. 429, 173 A. 309 reversed, 296 U. S. 113, 56 S. Ct. 31 (1935); *Schuylkill Trust Co. v. Pennsylvania*, 327 Pa. 127, 193 A. 638 affirmed, 302 U. S. 506, 58 S. Ct. 295 (1938).

16. *Com. v. Mellon National Bank & Trust Co.*, 374 Pa. 519, 98 A. 2d 168 cert. den., 346 U. S. 875, 74 S Ct. 127 (1953).

Under these circumstances, this Court has held that, in judging the constitutional right of a state to impose a tax, it is not limited by the state's characterization of the tax [17] and, further, that it is its duty "to decide for itself facts or constructions upon which federal constitutional issues rest." [18]

Despite the change in the nomenclature of the tax on foreign corporations from a capital stock tax to a "Franchise" tax, the tax still remains a tax on their property and assets represented by the actual value in cash of their capital stock:

a. The tax is imposed "upon a taxable value".

b. The tax is based upon the appraisal of capital stock "at its actual value in cash" which has been held to represent property and assets; [19] and this Court has held that a tax upon a corporation's capital "at a valuation" is of necessity a tax upon the property in which the capital has been invested. [20]

c. In applying the realities test in respect to the practical operation of the tax, the state court has found that the "Franchise" tax *is a part of the system* taxing the capital stock of corporations and that it "was obviously devised to reach the property of foreign corporations as the equivalent of the capital stock tax". [21]

d. Section 21(a) and (b) of the tax statute refers to future exemption from tax of "capital stock of cor-

17. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 443, 61 S. Ct. 246 (1940); *Society for Savings in the City of Cleveland v. Bowers*, 349 U. S. 143, 75 S. Ct. 607 (1955).

18. *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 121, 74 S. Ct. 403 (1954).

19. *Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669 (1905).

20. *Bank of Commerce v. New York City*, 2 Black 620, 67 U. S. 620 (1863); *Bank Tax Case*, 2 Wall. 200, 69 U. S. 200 (1865).

21. *Murray v. Philadelphia*, 364 Pa. 157, 170, 71 A. 2d 280 (1950); *Arrott's Estate*, 322 Pa. 367, 371, 185 A. 697 (1936).

porations * * * organized * * * for manufacturing purposes". This reference, of necessity, must apply to the capital and assets of foreign corporations and not to their privilege to do business in Pennsylvania.

c. Section 21(c) of the tax statute provides that domestic and foreign corporations liable for tax under Section 21 "shall not be required to pay any *further* tax on mortgages, bonds and other securities owned by them". (Emphasis supplied). Since the tax on the capital stock of domestic corporations is a property tax, it is obvious that the "Franchise" tax on foreign corporations is likewise a tax on property, otherwise another property tax on mortgages, etc. owned by the foreign corporations would not be a *further* tax. This proviso discloses the legislative intent to avoid double taxation of the *same property* and there is no double taxation, in the accepted legal sense, if the "Franchise" tax is on a privilege and another tax is on property.[22]

These points reveal clearly that the incidence of the "Franchise" tax is on property and assets and not on the privilege of doing business, and, therefore, the tax violates the credit clause of the U. S. Constitution and Revised Statutes § 3701.

(4) The Enforcement Concurrently of Conflicting State Court Decisions as to the Nature of the Tax Is so Arbitrary and Unreasonable as to Violate Due Process.

The net result of the state court decision in the instant case is to enforce the "Franchise" tax as a privilege tax on all foreign corporations and not to overrule, but to affirm, other state court decisions holding the same tax to be a property tax.

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22. *Ohio Tax Cases*, 232 U. S. 576, 593, 594, 34 S. Ct. 372 (1914); *Com. v. Globe Furnishing Co.*, 324 Pa. 180, 183, 188 A. 170 (1936).

It is true that due process does not require judicial interpretation of a tax statute to remain unchanged but it is still necessary that interpretations enforced concurrently be consistent.

It is well settled that the prohibition of the Fourteenth Amendment (U. S. Const.) applies to arbitrary action by the judiciary.[23] Likewise, it is well established that the test of due process is essentially a test of reasonableness.[24]

The right asserted by appellant in the present case is reasonable adjudication of its tax liability and protection against arbitrary action. Since the state court in the present case has sustained the "Franchise" tax as a privilege tax, which is directly opposed to its ruling in the *Philadelphia* case against the same taxpayer and also in prior cases (Notes 6 and 7), that the "Franchise" tax is a property tax, we are concerned here with *concurrent simultaneous opposite views of the court,* each impeaching the logic of the other but neither overruling the other. Such a situation, it is respectfully submitted, does not constitute reversal of prior decisions, mere error, or change by judicial construction but instead constitutes intentional rulings without justification, based on expediency or the exigencies of the particular case rather than on sound principles. The Bell Opinion supports these views.

Such enforcement by the state court of concurrently conflicting decisions violates the constitutional rights under Due Process of all foreign corporations subject to the "Franchise" tax statute, as well as appellant.

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23. *Chicago, Burlington and Quincy Railroad Co. v. Chicago,* 166 U. S. 226, 233-234, 17 S. Ct. 581 (1897); *Ladner et al. v. Siegel,* 298 Pa. 487, 148 A. 699 (1930).

24. *Santiago v. People of Puerto Rico,* (C. C. A. First Circuit) 154 F. 2d 811 (1946).

F. CONCLUSION.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal; that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution; and that, if the appeal should be considered as having been improvidently taken, the Court should consider it as a petition for certiorari; and appellant prays that final judgment of the Supreme Court of Pennsylvania be reversed and for such other relief as may be fit and proper.

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APPENDIX A.

TEXT OF PENNSYLVANIA STATUTES INVOLVED.

Section 20 of the Act of June 1, 1889, P. L. 420, as Last Amended by the Act of May 16, 1945, P. L. 606, 72 Purdon's Pennsylvania Statutes § 1901.

Section 20. That hereafter, except in the case of corporations of the first class, nonprofit corporations, and cooperative agricultural associations not having capital stock and not conducted for profit, banks, savings institutions, title insurance, or trust companies, building and loan associations, and foreign insurance companies, it shall be the duty of every corporation having capital stock, every joint-stock association, limited partnership, and every company whatsoever, now or hereafter organized or incorporated by or under any laws of this Commonwealth, and of every corporation, joint-stock association, limited partnership, and company whatsoever, now or hereafter incorporated or organized by or under the law of any other State or Territory of the United States, or by the United States, or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership or joint-stock association, company, or corporation whatsoever, association or associations, copartnership or copartnerships, person or persons, or in any other manner, to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

First. The amount of its capital stock at the close of the year for which report is made, together with the highest selling price per share, and the average selling price thereof during said year.

Second. Its debt account.

Third. Its income account, together with the disposition of any net income, and its profit and loss statement.

Fourth. Its general balance sheet.

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal, in the manner hereinafter provided, of the capital stock of the said corporation, company, joint-stock association, or limited partnership, at its actual value in cash as it existed at the close of the year for which the report is made.

The affidavit of two of the officers of such corporation, limited partnership, joint-stock association or company, shall be attached to said report. Such affidavit shall be in the form required by the Department of Revenue, but shall state, in addition to any other averments required by the department, that, with fidelity and according to the best of their knowledge and belief, the affiants have estimated, valued and appraised, as shown in said report, the capital stock of the said corporation at its actual value in cash as it existed at the close of the year for which report is made; taking into consideration, first, the average which said stock sold for during the year; and second, the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends, expended in betterments, or carried into the surplus or sinking fund; and third, the actual value indicated or measured by consideration of the intrinsic value of its tangible property and

assets, and of the value of its good will and franchises and privileges, as indicated by the material results of their exercise, taking also into consideration the amount of its indebtedness.

The time for filing reports may be extended; taxpayers may be permitted to file their reports on a fiscal year basis; the procedure in case the Department of Revenue is not satisfied with the appraisement made by the officers of the taxpayer, and the penalties for failing to file reports and pay taxes shall be as prescribed by law.

* * *

Section 21 of the Act of June 1, 1889, P. L. 420, as Last Amended by the Act of May 29, 1951, P. L. 462, 72 Purdon's Pennsylvania Statutes § 1871.

Section 21. (a) That every domestic corporation other than corporations of the first class, nonprofit corporations, and cooperative agricultural associations not having capital stock and not conducted for profit, and every joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to, and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said twentieth section: Provided, That the tax of five mills imposed by this sub-section on reports filed for the calendar years one thousand nine hundred forty-seven, one thousand nine hundred forty-eight, one thousand nine hundred forty-nine, one thousand nine hundred fifty, one thousand nine hundred fifty-one, and one thousand nine hundred fifty-two, or for the fiscal years beginning in the calendar years one thousand nine hundred forty-seven, one thousand nine hundred forty-eight, one thousand nine hundred forty-nine, one thousand nine hundred fifty, one thou-

sand nine hundred fifty-one, and one thousand nine hundred fifty-two, shall apply to the taxation of capital stock of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes, excepting companies engaged in the distilling of liquors: Provided, further, That after said six year period the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes, which is invested in and actually and exclusively employed in carrying on manufacturing within the State, excepting companies engaged in the distilling of liquors and such as enjoy and exercise the right of eminent domain, but every corporation, limited partnership or joint-stock association organized for the purpose of manufacturing shall pay the State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the manufacturing business, in addition to the local taxes assessed upon its property in the district where located, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing plant and business.

(b) Every foreign corporation, joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a franchise tax at the rate of five mills upon a taxable value to be determined in the following manner. The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this act, and shall then be divided into three equal parts.

(1) Of one third, such portion shall be attributed to business carried on within the Commonwealth, as shall be

found by multiplying said third by a fraction, whose numerator is the value of the taxpayer's tangible property not actually and exclusively used in manufacturing, situated within the Commonwealth, and whose denominator is the value of all the taxpayer's tangible property wherever situated.

(2) Of another third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the expenditures of the taxpayer for wages, salaries, commissions, or other compensation to its employes not exclusively engaged in manufacturing in this Commonwealth and assignable to this Commonwealth as hereinafter provided, and whose denominator is the total expenditures of the taxpayer for wages, salaries, commissions, or other compensation to all its employes.

(3) Of the remaining third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's gross receipts from business not strictly incident or appurtenant to manufacturing in this Commonwealth assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business.

The sum of the amounts, determined in accordance with the foregoing three rules, shall be the taxable value. In a case where only two of the foregoing three rules are applicable, the remaining third equal part of the value of the entire capital stock shall be divided into two equal parts, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, that part of the entire capital stock attributed to business carried on within the Commonwealth shall be determined solely by that rule.

The amount assignable to this Commonwealth of expenditures of the taxpayers for wages, salaries, commissions, or other compensation to its employes, shall be such expenditures for the taxable year as represent the wages, salaries, commissions, or other compensation of employes not chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth.

The amount of the taxpayer's gross receipts from business assignable to this Commonwealth shall be, (1) the amount of its gross receipts for the taxable year, except those negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth, and except rents and royalties, and interest and dividends, (2) rentals or royalties from property situated or from the use of patents within this Commonwealth, and (3) dividends and interest, except such dividends and interest attributable to the business conducted on premises maintained by the taxpayer outside the Commonwealth. If a taxpayer maintains an office, warehouse, or other place of business in a state other than this Commonwealth for the purpose of reducing its tax under this subsection, the Department of Revenue shall, in determining the amount of its gross receipts from business assignable to this Commonwealth, include therein the gross receipts attributed by the taxpayer to the business conducted at such place of business in another state.

In the case of construction contracts negotiated or effected at an office in the State of Pennsylvania, but performed outside the State, the gross receipts under such contracts shall be assignable outside the State, except that if the activities under any such contract to which the gross receipts are attributable shall occur partly within the State and partly outside the State, such proportion of the gross receipts under said contract shall be assignable to Pennsyl-

vania as the direct and indirect costs incurred in Pennsylvania under the contract for the taxable year bear to the total costs incurred thereunder for the taxable year. In the case of construction contracts negotiated or effected at an office outside the State, but performed in the State, the gross receipts under such contract shall be assignable to the State, except that if the activities under any such contract to which the gross receipts are attributable shall occur partly within the State and partly outside the State, such proportion of the gross receipts under said contract shall be assignable to Pennsylvania as the direct and indirect costs incurred in the State under the contract for the taxable year bear to the total cost incurred thereunder for the taxable year.

A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditures of a taxpayer for wages, salaries, commissions, or other compensation, or the gross receipts of the taxpayer are found to be situated, incurred, or received without the Commonwealth.

Notwithstanding the foregoing provisions of this subsection (b), the franchise tax of five mills imposed by subsection (b) on reports filed for the calendar years one thousand nine hundred forty-seven, one thousand nine hundred forty-eight, one thousand nine hundred forty-nine, one thousand nine hundred fifty, one thousand nine hundred fifty-one, and one thousand nine hundred fifty-two, and for fiscal years beginning in the calendar years one thousand nine hundred forty-seven, one thousand nine hundred forty-eight, one thousand nine hundred forty-nine, one thousand nine hundred fifty, one thousand nine hundred fifty-one, and one thousand nine hundred fifty-two shall apply to the taxation of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes, excepting companies engaged in the distilling of liquors, without excluding from the numerators of the applicable fractions tangible property actually and exclusively used in manufacturing, compensation of employes exclusively engaged in

manufacturing, and gross receipts from business strictly incident or appurtenant to manufacturing.

After said six year period the provisions of this subsection shall apply to the taxation of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes.

(c) It shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association, or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the Treasury of the Commonwealth within the time prescribed by law: Provided, That for the purposes of this act, interest in limited partnerships or joint-stock associations shall be deemed to be capital stock, and taxable accordingly: Provided further, That corporations, limited partnerships, and joint-stock associations, liable to a tax under this section, shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them and in which the whole body of stockholders or members, as such, have the entire equitable interest in remainder; but corporations, limited partnerships, and joint-stock associations, owning or holding such securities as trustees, executors, administrators, guardians, or in any other manner than for the whole body of stockholders or members thereof as sole equitable owners in remainder, shall return and pay the tax imposed by this act upon all securites so owned or held by them, as in the case of individuals: Provided further, That the tax of five mills, imposed by this section on reports filed for the calendar years one thousand nine hundred and thirty-five and one thousand nine hundred and thirty-six, and for each calendar year thereafter, or for the fiscal years beginning in the calendar years one thousand nine hundred and thirty-five and one thousand nine hundred and thirty-six, and for each fiscal year thereafter, shall apply to the taxation of the capital stock of corporations, limited partnerships, and joint-stock associations, organ-

ized for laundering and for the processing and curing of meats, their products and by products, excepting companies engaged in the distilling of liquors: Provided further, That in case of fire and marine insurance companies, the tax imposed by this section shall be at the rate of five mills upon each dollar of the actual value of the whole capital stock: Provided, That nothing in this act shall be so construed as to apply to building and loan associations chartered by the State of Pennsylvania.

* * *

APPENDIX B.

COPIES OF OPINIONS AND JUDGMENTS BELOW.

(As reported in 390 Pa. 642; 136 A. (2d) 821: headnotes and names of counsel omitted.)

Commonwealth v. National Biscuit Company, Appellant.

Argued May 27, 1957. Before JONES, C. J., BELL, CHIDSEY, MUSMANNO, ARNOLD and JONES, JJ.

Appeal, No. 25, May T., 1957, from judgment of Court of Common Pleas of Dauphin County, No. 59, Commonwealth Docket, 1954, in case of Commonwealth of Pennsylvania v. National Biscuit Company. Judgment affirmed; reargument refused January 2, 1958.

Appeal by taxpayer from decision of the Board of Finance and Revenue refusing petition for review of franchise tax settlement. Before RICHARDS, P. J., NEELY, SOHN, and KREIDER, JJ.

Adjudication filed finding for plaintiff, defendant's exceptions to adjudication dismissed, and final judgment entered. Defendant appealed.

OPINION BY MR. JUSTICE CHIDSEY, November 11, 1957:

This appeal by National Biscuit Company questions the amount of State tax imposed on it for the year 1952 under the Act of May 16, 1935, P. L. 184, which imposes a franchise tax on foreign corporations doing business in Pennsylvania.

Appellant was incorporated in New Jersey, has its principal office in New York City and is duly registered to do business in Pennsylvania where during the tax year in question it engaged in its business of the manufacture and sale of bakery products. Following the filing of its franchise tax report for said year and in conformity therewith,

the tax payable by appellant was settled by the fiscal officers of the Commonwealth in the amount of $58,321.60. A petition for resettlement was refused. Appellant paid the tax but filed a petition for review with the Board of Finance and Revenue which was denied and the tax settlement sustained. On appeal, the Dauphin County Court (four judges sitting) upheld the action of the tax authorities and entered judgment nisi in favor of the Commonwealth and against appellant in the said amount of $58,321.60 (to be marked satisfied upon payment of costs). After consideration of exceptions filed, the court entered a final judgment affirming its judgment nisi. This appeal followed.

Appellant's contention will be better understood by a preliminary reference to the tax legislation involved. Prior to the enactment of the Franchise Tax Act of 1935, both domestic and foreign corporations were subject to the Capital Stock Tax Act of June 1, 1889, P. L. 420, which, as repeatedly held by this Court, imposed a tax on property. Therefore, in the case of foreign corporations there was taxed only so much of the corporation's capital stock as the ratio of tangible assets within the Commonwealth bore to all of the assets of the foreign corporation wherever situated. This worked an unfair discrimination in favor of foreign corporations against domestic corporations (see *Commonwealth v. Columbia Gas and Electric Corporation*, 336 Pa. 209, at p. 215, 8 A. 2d 404), which was remedied by abandonment of the capital stock tax as to foreign corporations and the imposition of a franchise tax in its stead. This was accomplished by amendment to the Capital Stock Tax Act of 1889: (See 72 PS § 1871 for the Act of 1889 as amended by the Act of 1935). The amendatory Act of 1935 is entitled "An Act to further amend . . . by substituting a franchise tax on foreign corporations in lieu of the capital stock tax on such corporations". The new tax thus imposed on foreign corporations is, as termed in the title and in the body of the amendatory Act, a "franchise tax", i.e.,

a tax on the privilege of doing business in the Commonwealth as we have frequently stated. In order to determine the value of the exercise of this privilege conferred by the Commonwealth, the Franchise Tax Act provides a formula for the ascertainment of the corporation's activities within the State. The business transacted in the State is measured through allocation fractions involving the proportion which the tangible property in the State, the payroll in the State and the gross receipts in the State respectively bear to the total assets, payroll and gross receipts of the corporation. It is unnecessary to set forth in detail the factors composing the formula. They were discussed at length in the *Columbia Gas* case, 336 Pa., supra (see p. 214 et seq.) and in *Commonwealth v. Ford Motor Company,* 350 Pa. 236, (see p. 240 et seq.), 38 A. 2d 329 and the formula approved as a reasonable measure of value.

In accordance with the formula and as required thereunder for the determination and application of the allocation fractions necessary for the computation of the tax, the taxing departments in appraising appellant's entire capital stock included all of the defendant's tangible and intangible assets as listed in the balance sheet contained in its Franchise Tax Report for 1952, excepting its investment in shares of stock of subsidiary companies operating in foreign countries which, together with the income derived therefrom, was excluded; this exclusion is not in issue. Claiming that the tax in question is a property tax and therefore extraterritorial assets of the corporation may not be included in arriving at the taxable valuation, appellant asserts that the formula or method applicable under the Capital Stock Tax Act should be applied to it. By stipulation it was agreed that under the formula prescribed by the Franchise Tax Act the taxable valuation is $11,664,320, and the resulting tax $58,321.60 as settled; that if, as claimed by appellant, the method or formula used in settling capital stock tax against appellant prior to the enactment

of the Franchise Tax Act were applied, the taxable valuation would be $5,734,202 and the tax thereon $28,671.01 which, since the tax as settled in the amount of $58,321.60 was paid, would entitle appellant to a credit of $29,650.59.

Appellant contends that the tax as computed and imposed on it offends various provisions of the State and Federal Constitutions. The contention rests upon the premise or assumption that the Franchise Tax Act of 1935 imposed a property tax. In cases decided by this Court following the passage of the Act of 1935 we unequivocally and repeatedly held that the franchise tax imposed by it is not a property tax but, as its name implies, a tax levied for the privilege of doing business in the Commonwealth, and its constitutionality was upheld: *Commonwealth v. Columbia Gas and Electric Corporation*, supra (1939); *Commonwealth v. Ford Motor Company*, supra (1944); *Commonwealth v. Quaker Oats Company*, 350 Pa. 253 (1944), 38 A. 2d 325; *Commonwealth v. Monessen Amusement Company, Inc.*, 352 Pa. 120 (1945), 42 A. 2d 158. The constitutional attacks upon the Act rested then, as they do now, upon the contention that the tax imposed by it is a property tax.

In *Commonwealth v. Columbia Gas and Electric Corporation*, supra, in which the constitutionality of the Franchise Tax Act was upheld in the first judicial interpretation of the tax, this Court said at p. 217 et seq.: "Did the legislature intend to change its old policy of levying a property tax and create in its stead a franchise tax upon foreign corporations? *We concur with the court below in its conclusion that the tax is a franchise tax and not a property tax.* The legislature in the title to the act called it a franchise tax. While not conclusive, some weight should be given to this designation in determining the nature of the tax. . . . Whether this is a property tax or a franchise tax rests to some extent upon the method of its ascertainment and the incidence of the tax itself. Where a tax is imposed directly on specific property, it is a property tax. *The*

incidence of a franchise or privilege tax is upon a franchise or privilege and not upon property or capital. . . .

"Among the standards used for distinguishing a franchise tax from a property tax has been the method adopted for laying them and fixing the amount. . . . The determination of the value of the franchise under the amendatory Act may bring into consideration property situated within the Commonwealth, and give to it a functional value as part of an organic unit. *But the incidence of the tax is fixed upon the value of the franchise; not upon the property itself.* To ascertain that taxable value there must, of course, be a method.

"Under the 1935 Act, the underlying element in the ascertainment of the value of the franchise is the value of the entire capital stock of each foreign corporation. We referred to this in Arrott's Estate, 322 Pa. 367, as being the base. The attempt to determine what part of the value of this base should be the taxable value called for by the Act is to ascertain with approximate correctness the equivalence of that value which the legislature deemed the franchise or right to do business in this State to have." (Emphasis supplied).

In *Commonwealth v. Ford Motor Company,* supra (appeal dismissed 324 U. S. 827), at p. 240 et seq. we said: ". . . This Act imposes a *franchise or excise* tax upon foreign corporations as distinguished from a property or ad valorem tax. Prior to 1935, foreign corporations doing business here were required to pay a capital stock tax, which, as a property tax, proved unsatisfactory and produced unfair results. As we stated in Arrott's Estate, 322 Pa. 367, 372, 185 A. 697, the Act of 1935, by changing the incidence of the foreign corporation tax, endeavored to achieve a more equitable measurement of taxation for this class of corporation. It accomplished this by imposing a franchise tax not *upon* capital stock but *measured* by capital stock. The tax base was determined, not by the allocation to Pennsylvania of an arbitrary percentage of the total

capital stock of the corporation, but, through the use of a tripartite formula, by ascertaining, insofar as possible, the relation of the corporate activities in this State to the activities of the corporation everywhere. In the Columbia Gas and Electric Corp. case, supra, at page 216, we said: 'The tax base represents the value of [the] right to do business in this State.' . . . (Emphasis the Court's).

"In the Columbia Gas and Electric Corp. case, supra, we held that the tax, *not being a property tax, but a tax upon the privilege of engaging in business in this Commonwealth*, should be measured by a valuation reflecting capital so used as to affect the value of the Pennsylvania franchise, rather than a valuation reflecting merely aggregate capitalization. . . ." (Emphasis supplied).

In *Commonwealth v. Quaker Oats Company*, supra (appeal dismissed 324 U. S. 827), we said at p. 260: ". . . the tax is imposed upon the privilege of doing business here, measured by capital stock. . . ."

In *Commonwealth v. Monessen Amusement Company, Inc.*, supra, the court below had held that the value of shares in a domestic corporation owned by a foreign corporation must be deducted in fixing the valuation of the foreign corporation for franchise tax purposes. In reversing the court below, this Court said at p. 122: ". . . Appellee's contention in the present case and the decision of the court below are both rested on the false assumption that the franchise tax, in some way, is a tax upon the *property* of the corporation which is used as a measure for the tax. . . .

"As we stated in Commonwealth v. Ford Motor Company, supra, the franchise tax is not a tax upon the property of the corporation, but upon the doing of business in this Commonwealth. . . ." (Emphasis the Court's).

In *Commonwealth v. American Gas Company*, 352 Pa. 113, 117 (1945), 42 A. 2d 161, we said: ". . . The former capital stock tax upon foreign corporations was a *property* tax which could only be imposed upon corporations having property subject to the jurisdiction of the taxing authori-

ties. The franchise tax, however, is a tax on the privilege of doing business and is an *excise* tax, as we have pointed out in numerous cases. . . ." (Emphasis the Court's).

In *Commonwealth v. Eaglis Corporation*, 354 Pa. 493 (1946), 47 A. 2d 661, we stated, p. 499, that the inclusion of intangibles as well as tangibles in the valuation of capital stock ". . . does not make the franchise tax a property tax. It is an excise upon a foreign corporation's privilege of doing business within the State: . . . The capital stock value is but a factor in the legislatively prescribed formula for determining the value of the privilege."

In referring to the *Columbia Gas and Electric Corporation, Ford Motor Company, Quaker Oats Company* and *Monessen Amusement Company* cases, appellant expressly concedes that these cases held that the franchise tax is an excise tax upon foreign corporations for the privilege of doing business in Pennsylvania. In its brief it states: "In these cases, the question, inter alia, of whether or not the franchise tax was an excise or a property tax was at issue and in each case the Court held that the franchise tax was an excise tax and that property such as United States securities and other intangible, as well as tangible, property located outside of the State could be constitutionally included in the tax base for the reason that there was no direct tax thereon."

In an effort to overcome the decisive effect of our rulings in the above cited cases, appellant points to language employed in some later cases which referred to the franchise tax as a property tax. These cases, *Federal Drug Company v. Pittsburgh et al.*, 358 Pa. 454 (1948), 57 A. 2d 849; *Murray et ux. v. Philadelphia et al.*, 364 Pa. 157 (1950), 71 A. 2d 280, and *National Biscuit Co. v. Philadelphia*, 374 Pa. 604 (1953), 98 A. 2d 182, were concerned with the validity of certain city ordinances. They arose under enabling statutes which permitted local municipal subdivisions to enter the tax field not occupied by the State, and the issue was whether the imposition of the local tax exceeded the power

granted the municipality by duplicating an existing tax levied by the State. The question presented in all of them was whether the local tax resulted in double taxation which was legislatively prohibited under the enabling Act. The local ordinance was under attack and not the State Franchise Tax Act. In *every* case arising between the Commonwealth and its taxpayers where the imposition of the franchise tax has been challenged, in upholding its validity we have invariably declared it to be an excise tax upon the privilege of doing business in the Commonwealth. We do not intend to depart from this settled ruling which is in complete accord with rulings of the United States Supreme Court, a number of which are hereinafter referred to.

After considering five of the cases which we have above reviewed unequivocally holding the tax in question to be an excise tax, and the three cases relied on by appellant as holding the contrary, President Judge RICHARDS, specially presiding, speaking for the unanimous court below, pertinently said: "The latter three cases mentioned above did not expressly overrule the first five referred to. The latter three were not contests between the State and its taxpayers. Interpretation and application of the franchise tax act were not directly involved. We know of no case in which the Supreme Court has deviated from its declaration that the franchise tax is a tax on foreign corporations for the privilege of doing business in Pennsylvania. . . . No matter what terminology has been employed as to the nature of the tax, or what adjectives have been used to describe it, the reported cases between the Commonwealth and its taxpayers, in which the statute is applied, have consistently held as we have indicated. It is our conclusion, therefore, that the tax settlement in the present case was correct."

In determining whether a tax duplicates another tax and results in double taxation prohibited to local taxing authorities, the operation or incidence of the two taxes is controlling as against mere differences in terminology from time to time employed in describing taxes in various cases.

The incidence of a tax embraces the subject matter thereof and, more important, the measure of the tax, i.e., the base or yardstick by which the tax is applied. If these elements inherent in every tax are kept in mind, the incidence of the two taxes may or may not be duplicative. Thus analyzed and viewed in determining whether double taxation has occurred, the *decisions* upon which appellant relies are readily reconcilable with the cases holding the corporate franchise tax to be an excise tax. The subject matter of the latter is the privilege of doing business in Pennsylvania and the measure is the value of the capital stock related to the exercise of the State franchise conferred on it. In *Federal Drug Company v. Pittsburgh*, 358 Pa. 454, supra, relied on by appellant, not only the measure but the subject matter of the mercantile license tax imposed by the challenged Pittsburgh ordinances differed from the State franchise tax. The distinctions were plainly set forth in the opinion of the Court. In disposing of the contention that the city tax duplicated the State franchise Act in violation of the prohibition of the so-called Tax Anything Act,[1] we said at p. 457:

"The answer to this contention is twofold. The Act of 1935, supra, is a tax for the privilege of a foreign corporation coming into the state of Pennsylvania for the purpose of conducting its business *in corporate form*. The city ordinance, under attack, is a tax for the privilege of doing business within the city with respect to *any* individual, partnership or corporation. It is not a tax limited to foreign corporate associations. In the second place, while in each case the *object* of the tax is to license for the purpose of doing business, the tax actually *imposed* by the

1. Act of June 25, 1947, P. L. 1145, as amended, 53 PS § 6851, which broadened the taxing powers of various political subdivisions (other than cities of the first class) and school districts, with the limitation, however, that they should not have authority to impose a tax on a privilege, transaction, subject, occupation, or personal property which is or becomes subject to a State tax or license fee, nor on the privilege of employing such tangible property as is or becomes subject to a State tax or license fee.

Foreign Corporate Franchise Tax is measured by the value of *the property of the foreign corporation within the state.* In the Pittsburgh ordinances the tax is on the *gross volume* of business conducted by the taxpayer. The respective impacts of the two taxes are on a totally different basis." (Emphasis the Court's).

In *National Biscuit Co. v. Philadelphia,* 374 Pa. 604, supra, relied upon by appellant, the City of Philadelphia had similarly imposed a mercantile license tax on the "gross volume of business" transacted by persons engaged in manufacturing, professions, occupations, trades, vocations and commercial activities in the City. As in the *Federal Drug Company* case, the Philadelphia mercantile tax differed widely both as to subject matter and measure from the State franchise tax, and accordingly was not duplicative of the latter. The reasoning and principles established in upholding the Pittsburgh mercantile tax in the *Federal Drug Company* case were equally applicable and decisive of the validity of the Philadelphia mercantile tax. It was therefore unnecessary in the *National Biscuit Co.* case to refer to the State franchise tax as a property tax or to treat it as such. In so doing language in the opinion in *Murray v. Philadelphia,* supra, was referred to, but what was said in the *Murray* case in this regard was likewise unnecessary to the decision there reached.

In the *Murray* case, decided in 1950, the Philadelphia ordinance imposing a net income tax was attacked. It was held invalid as violative of the Sterling Act.[2] The Philadelphia tax was measured by *net income* and the State corporate net income tax is measured by *net income.* There was a clear duplication in the impact of the two taxes, resulting in the prohibited double taxation. This compelled

2. Act of August 5, 1932, P. L. 45, 53 PS § 1597.1 which had previously broadened the tax powers of the City of Philadelphia in a manner similar to the Tax Anything Act of 1947 (see Footnote 1, supra), with like limitations, prohibiting the imposition of ". . . any tax on a privilege, transaction, subject or occupation or on personal property which is now or may hereafter become subject to a State tax or license fee."

the Court to hold as it did that the Philadelphia tax conflicted with the corporate net income tax and this was all that was required for the disposition of the case. However, the opinion, quite unnecessarily, went on to say that the Philadelphia tax also collided with the State franchise tax because both could be considered property taxes. This assertion rested upon a likening of the franchise tax to the capital stock tax. It was stated at p. 170: ". . . The franchise tax is imposed by the same Act of Assembly that imposes the capital stock tax and was obviously devised to reach the property of foreign corporations as the equivalent of the capital stock tax: Arrott's Estate, 322 Pa. 367, 371, 185 A. 697 (1936); Commonwealth v. Union Trust Co. of Pittsburgh, 345 Pa. 298, 307, 27 A. 2d 15 (1942) . . ." As stated in the opinion, the franchise tax has been considered ". . . an excise tax in some contexts, in others . . . a tax on property." In the *Murray* case the Court was considering the concept of the tax in passing on the validity of the City tax. In the instant case the concept of the tax is being considered in a direct attack upon the State franchise tax, and as before stated in this opinion, we have repeatedly and invariably ruled in cases between the Commonwealth and its taxpayers that the franchise tax is an excise tax and not a property tax. Moreover the Commonwealth was not a party to the *Murray* case and it should not be construed as adjudicating the rights of the Commonwealth.

Arrott's Estate and the *Union Trust Company* case were cited in support of the above quoted statement in *Murray*. No reference was made to later cases where the franchise tax was directly attacked and it was ruled that the franchise tax is *not* the equivalent of the capital stock tax. *Arrott's Estate*, decided in 1936, had ruled that, for the purpose of the exemption from personal property taxation of shares of stock on which capital stock tax had been paid, the franchise tax was the equivalent of the capital stock tax. The *Union Trust Company* case, decided in

1942, merely extended the rule in *Arrott's Estate* by extending the exemption for personal property taxation to shares of stock on which a tax on bank shares had been paid. In *Commonwealth v. Monessen Amusement Company, Inc.*, 352 Pa. 120, supra, decided in 1945, nine years after the decision in *Arrott's Estate*, and where we were directly construing the rights of a State taxpayer under the Franchise Tax Act, we denied to a foreign corporation an exemption for the ownership of stock of a domestic corporation claimed on the basis of double taxation, holding that there could be no double taxation, because the capital stock tax was a property tax, while the franchise tax was an excise tax for the privilege of doing business in Pennsylvania. We rejected the taxpayer's reliance upon the decision in *Arrott's Estate* and refused to find that the capital stock tax and the franchise tax were equivalent.

Conversely, in *Commonwealth v. Shenango Furnace Company*, 362 Pa. 491, 493, 67 A. 2d 113, decided in 1949, we denied to a domestic corporation an exemption from capital stock tax for the ownership of stock of a foreign corporation which was subject to the payment of franchise tax, saying: "As in the Monessen case, supra, the appellant bottoms its argument on the decision in Arrott's Estate, 322 Pa. 367, 185 A. 697, where a certain equivalence between the capital stock tax on domestic corporations and the franchise tax on foreign corporations was recognized. What the appellant overlooks, however, is that the equivalence, so noted, was of importance in Arrott's Estate to the construction of the express exemption provisions of the four mill county tax Act of June 17, 1913, P. L. 507, and the State Personal Property Tax Act of June 22, 1935, P. L. 414, there involved. No such question arises here under either of the statutes with which this case is concerned, viz., the capital stock tax Act of June 1, 1889, P. L. 420, and the franchise tax Act of May 16, 1935, P. L. 184. The questions of express exemption and of alleged double taxation

are without presently material bearing upon one another, as the Monessen case distinguishment of Arrott's Estate clearly reveals."

The *Monessen* and *Shenango* cases clearly demonstrate the line of cleavage between the decisions of this Court dealing directly with State corporation taxes, and those involving local taxes, and nullify the effect of the statement in *Murray* regarding the equivalence of the franchise tax and the capital stock tax, or at least limit the scope of the language there employed to cases where a conflict between a challenged local tax and a State tax was in question.

It should be readily apparent that the considerations before a court when confronted by an attack upon a local tax as violative of the Sterling Act or of the so-called "Tax Anything Act", and the considerations when an attack is made as here, upon the constitutionality and validity of a State tax, are wholly different. And equally apparent it must be that the words as used in either case have judicial meaning only within the context of the problem to which they are applied. When carefully analyzed, and the incidence of the taxes considered, the decisions in the cases relied on by appellant are not only consistent inter se, but are not at variance with the cases in which we have ruled the franchise tax to be an excise tax and not a property tax.

Appellant makes the additional contention that, whatever our ruling may be on the main issue presented, at least the United States securities owned by appellant should not be included in the tax computation because of the general immunity which such securities enjoy from State and local taxation.[3] This contention is not new; it was raised and rejected in the *Ford* and *Quaker Oats* cases, supra. In the *Ford* case, 350 Pa. 236, supra, Mr. Justice Allen Stearne in dismissing the contention that there was dis-

3. According to appellant's calculation, the elimination of its United States securities in the computation of the tax would reduce the tax payable by it to $50,080.27, entitling appellant to a credit of $8,241.33.

crimination in our tax laws against foreign corporations in favor of domestic corporations because of certain exemptions enjoyed by the latter in the computation of the capital stock tax, said at p. 250: ". . . In this contention there is apparent again appellant's studied confusion of the essential difference between a property tax and a franchise tax. Certain property of domestic corporations, *including United States obligations* and tangible property having an extraterritorial location is excluded from the valuation of their capital stock for purposes of the direct tax. Obviously, this property could not constitutionally be included. Similar property, if owned by a foreign corporation and so employed by it as to affect the value of the franchise in Pennsylvania, is, on the other hand, included in the measurement of the base of the franchise tax. . . ." (Emphasis supplied).

The United States Supreme Court has consistently ruled that a State may constitutionally levy an excise tax on corporations for the privilege of doing business, and measure the tax by the property or net income of the corporation, including tax exempt United States securities or the income derived therefrom: *Provident Institution v. Massachusetts,* 6 U. S. (6 Wall.) 611 (1868); *Society for Savings v. Coite,* 6 U. S. (6 Wall.) 594 (1868); *Hamilton Company v. Massachusetts,* 6 U. S. (6 Wall.) 632 (1868); *Home Insurance Company v. New York State,* 134 U. S. 594 (1890); *Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Commission,* 309 U. S. 560 (1940); *Educational Films Corporation of America v. Ward, Attorney General of New York et al.,* 282 U. S. 379 (1931); *Werner Machine Co., Inc. v. Director of Division of Taxation, Department of the Treasury, of New Jersey,* 350 U. S. 492 (1956).

Appellant contends that the United States Supreme Court held otherwise in *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey et al.,* 338

U. S. 665. This is clearly a misinterpretation of the ruling. In that case a local tax assessment was held to be invalid because it was tax *on* United States securities. The United States Supreme Court distinguished the case from its decisions in *Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Commission,* supra, and *Educational Films Corporation of America v. Ward,* supra, saying that the tax concerned in the latter two cases ". . . was not measured in effect by the amount of the taxpayer's federal securities or interest but *was a franchise tax measured by net income.* The section here in question was not considered as imposing a tax on privilege or franchise by either the New Jersey Legislature or the taxing officials or by any of the courts below. While we are not limited by the state's characterization of its tax, cf. Wisconsin v. J. C. Penney Co., 311 U. S. 435, 443 (1940), we likewise do not think the assessment can be sustained as one levied on a corporate franchise. . . ." (Emphasis supplied).

In the *Werner Machine Co.* case, 350 U. S. 492, supra, the Supreme Court held that the tax imposed by the State of New Jersey measured by the corporation's "net worth" was a tax on the corporate franchise which did not discriminate against Federal obligations and was valid despite the inclusion of Federal bonds in the determination of net worth. The appellant in that case made the same argument as appellant is making in the case before us. In sustaining the New Jersey tax the Court said at p. 494: ". . . And since this is a tax on the corporate franchise, it is valid despite the inclusion of federal bonds in the determination of net worth. This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. [Citing cases]. . . . New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U. S. 665, on which appellant relies, is distinguishable, in that it did not involve a franchise tax, but rather a tax whose legal

incidence this Court found to be upon the intangible assets of the corporation."

Equally untenable is appellant's argument that in some way it has been deprived of due process. In *Standard Oil Company of Indiana v. State of Missouri on the Information of Hadley, Attorney General, Succeeded by Major*, 224 U. S. 270, 287, the Court said: "The 14th Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done, the requirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law. . . ." The Commonwealth's Constitution requires no more.

Appellant claims that if the franchise tax settlement against it is upheld, such decision will be so contrary to the decision in *National Biscuit Co. v. Philadelphia*, supra, involving the same taxpayer, that it will amount to arbitrary judicial action and thus constitute a denial of due process. It is sufficient answer that, as we have pointed out, the decision in *National Biscuit Co. v. Philadelphia* is not inconsistent but, on the principles stated in the *Federal Drug Company* case, entirely reconcilable with our rulings in cases challenging the franchise tax. Even if appellant's untenable assumption were adopted that the two decisions are irreconcilable and that *National Biscuit Co. v. Philadelphia* must be considered a holding that the franchise tax is a property tax, that would not prevent this Court from presently ruling otherwise. As stated in *Patterson v. Colorado ex rel. The Attorney General of the State of Colorado*, 205 U. S. 454, 461: ". . . There is no constitutional right to have all general propositions of law once adopted remain unchanged. . . . in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, *is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.*" (Emphasis supplied).

As first stated, however, we consider all of our decisions in cases involving statutory prohibition of double taxation entirely reconcilable with our many decisions declaring the franchise tax constitutionally unassailable. And we are satisfied that it was properly applied by the taxing authorities in the present case. The franchise tax has been so applied since its inception more than twenty years ago as an excise tax for the privilege of doing business in Pennsylvania in accord with our many decisions upholding the formula under which the tax due is ascertained and no sufficient reason has been advanced for changing our firm rulings.

Judgment affirmed.

CONCURRING OPINION BY MR. JUSTICE BELL:

I write this opinion with great reluctance, but fairness to the appellant compels me to do so. I am in complete disagreement with some parts of the majority opinion, its attempted distinctions of prior decisions of this Court, and its failure to overrule the latest decision of this Court, viz., *National Biscuit Company v. Philadelphia,* 374 Pa. 604, 98 A. 2d 182 (1953). In that case, where the basic issue was, as in the present case, whether the (State) Foreign Corporation Franchise Tax Act of May 16, 1935, P. L. 184, 72 PS 1871, imposed a franchise tax or a property tax, this Court held that said Act imposed a *property tax;* and therefore the so-called Philadelphia Mercantile License Tax, since it was an excise or franchise tax, was not a duplication of the State Foreign Corporation Franchise Tax Act and for this reason, it was not legislatively prohibited under the Sterling Act. The Court * relying upon the most recent decisions of this Court, viz., *Federal Drug Company v. Pittsburgh et al.,* 358 Pa. 454, 57 A. 2d 849 (1948), and *Murray v. Philadelphia et al.,* 364 Pa. 157, 71 A. 2d 280 (1950), held, we repeat, that the aforesaid Foreign Corpora-

* With Justices ALLEN M. STEARNE, BELL and MUSMANNO dissenting.

tion Franchise Tax Act of May 16, 1935, *imposed a property tax and not a franchise tax*, and said (page 612):

". . . as to the payments made to the Commonwealth of capital stock taxes, corporate net income taxes, *foreign corporation franchise taxes,* * * and taxes on net earnings or income, it need merely be pointed out that *all those taxes have been held, many times, to be property taxes.* In an opinion by Mr. Justice LINN, who cited many previous authorities so holding, the capital stock tax was again declared in Murray v. Philadelphia, 364 Pa. 157, 166, 71 A. 2d 280, 284, to be a tax on the property of the corporation, and so likewise (following Blauner's Inc. v. Philadelphia, 330 Pa. 342, 198 A. 889, and Philadelphia v. Samuels, 338 Pa. 321, 12 A. 2d 79) the corporate net income tax (p. 169, A. p. 286), *the franchise tax* (p. 170 A. p. 286), and (following Kelley v. Kalodner, 320 Pa. 180, 187, 181 A. 598, 601) a tax on net earnings or income (p. 175, A. p. 289). On the other hand, the authorities are equally numerous to the effect that a mercantile license tax is not a tax on property or income, but an excise [or franchise] ** tax upon the privilege of transacting business measured by the gross volume of business annually transacted: Knisely v. Cotterel, 196 Pa. 614, 46 A. 861; Commonwealth v. Harrisburg Light & Power Co., 284 Pa. 175, 130 A. 412; Commonwealth v. Globe Furnishing Co., 324 Pa. 180, 188 A. 170; Commonwealth v. McKinley-Gregg Automobile Co., 345 Pa. 544, 28 A. 2d 919; Commonwealth v. Bailey, Banks & Biddle Co., 20 Pa. Superior Ct. 210; H. J. Heinz Co. v. School District of Pittsburgh, 170 Pa. Superior Ct. 441, 87 A. 2d 85. *Since clearly, therefore, a mercantile license tax is not a duplication of any of the property taxes* paid by appellees to the Commonwealth, the City of Philadelphia is not prohibited by reason of any limitation on its power contained in the Sterling Act from imposing such a tax on corporations otherwise subject thereto."

** Italics and brackets throughout, ours.

The present majority opinion says: "Appellant contends that the tax as computed and imposed on it offends various provisions of the State and Federal Constitutions. The contention rests upon the premise or assumption that the Franchise Tax Act of 1935 imposed a property tax. In cases decided by this Court following the passage of the Act of 1935 we *unequivocally and repeatedly held that the franchise tax imposed by it is not a property tax* but, as its name implies, a tax levied for the privilege of doing business in the Commonwealth, and its constitutionality was upheld: Commonwealth v. Columbia Gas and Electric Corporation, supra (1939); Commonwealth v. Ford Motor Company, supra (1944); Commonwealth v. Quaker Oats Company, 350 Pa. 253 (1944), 38 A. 2d 325; Commonwealth v. Monessen Amusement Company, Inc., 352 Pa. 120 (1945), 42 A. 2d 158." This statement flies in the teeth of the more recent opinions and decisions of this Court which as above demonstrated held expressly, squarely and specifically to the contrary.

The present majority opinion attempts to distinguish the earlier cases from the recent cases which hold clearly, directly and exactly to the contrary, on the ground that the recent cases dealt with a local ordinance. Of course this attempted distinction not only disregards the recent decisions and the clear and forceful language of the Court's opinions, but it also completely overlooks the fact that the local ordinance (of the City of Philadelphia) whose validity was challenged was absolutely invalid and void under the Sterling Act, if it levied or collected "any tax on a *privilege*, transaction, *subject*, or occupation or on personal property which is now or may hereafter become subject to [1] a state tax or [2] a license fee." The most important and basic issue in *National Biscuit Company v. Philadelphia*, 374 Pa., supra, as well as in the recent cases hereinabove cited, was whether the State taxes—including the State Franchise Tax Act of May 16, 1935—were franchise taxes or property taxes. In that case the majority, we repeat, held that the

taxes imposed by the State Franchise Tax Act of 1935 (and other State Tax Acts enumerated therein) were *property taxes* and consequently sustained the validity of the Philadelphia so-called Mercantile License Tax as a franchise or excise tax, i.e., a tax for the privilege of doing business in Philadelphia. This was the basic and only legal ground upon which (a majority of) the Court sustained the ordinance.

How this Court can one moment say that a tax imposed by a certain State Act is a property tax, and the next moment say that it is a franchise tax, or vice versa, is to me incomprehensible;* how this Court can then say that all the flatly contradictory and irreconcilable decisions of this Court on this point are harmonious and reconcilable, is to me incomprehensible; and finally, how this Court can reach its present conclusion (that the State franchise tax is a franchise tax, with which I agree) without overruling *National Biscuit Company v. Philadelphia*, 374 Pa. supra, and the recent cases which say exactly the opposite, is likewise incomprehensible.

I would hold that the franchise tax which is imposed by the State by the Act of May 16, 1935, supra, on foreign corporations doing business in Pennsylvania, is a franchise tax; and I would overrule all prior decisions of this Court which hold that it imposes a property tax; and I would particularly overrule *National Biscuit Company v. Philadelphia*, 374 Pa., supra.

Mr. Justice MUSMANNO and Mr. Justice BENJAMIN R. JONES join in this concurring opinion.

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* See footnote to my dissenting opinion in *National Biscuit Company v. Philadelphia*, 374 Pa., supra (p. 637): "The distinction or line of demarcation between a privilege tax, an excise tax and a property tax, which in the last analysis must be determined by the incidents and the nature and legal effect of the Act rather than by the name by which it is described, is so nebulous, flexible and fluctuating, that the decisions on this point throughout the entire country are ofttimes vacillating, confused and contradictory. See: 53 C. J. S., Licenses, pp. 457-461."

APPENDIX C.

PETITION FOR REARGUMENT AND ORDERS ENTERED IN SUPREME COURT OF PENNSYLVANIA NO. 25, MAY TERM 1957.

Order Entered Granting Extension of Time to File Petition for Reargument.

And Now, upon motion of Leslie M. Swope, Esq., of counsel for the Appellant, National Biscuit Company, upon cause shown as set forth in the accompanying petition, it is hereby ordered:

1. That Petitioner, National Biscuit Company, be and is hereby granted an extension of time within which to file a petition for reargument of the above entitled case until and including, Monday, December 2, 1957 and

2. That the Prothonotary of this Court shall hold the Record for said period of time and, upon filing such petition for reargument, until action is taken by the Court thereon.

Dated this 19th day of November, 1957.

Charles Alvin Jones,
C. J.

Petition of Appellant for Reargument (Filed Dec. 2, 1957).

To the Honorable, the Justices of the Supreme Court of Pennsylvania:

The petition of National Biscuit Company, appellant in the above case, by its attorneys, Roy J. Keefer and Leslie M. Swope, respectfully prays your Honorable Court to grant it a reargument for the reasons set forth below. The judgment of the lower court was affirmed on Novem-

ber 11, 1957 in two separate opinions and Appellant was granted an extension of time to and including December 2, 1957, within which to file this Petition.

I. By reaffirming the Court's prior decisions in National Biscuit Co. v. Philadelphia and other cases relied upon by Appellant, the majority in effect holds that the so-called franchise tax is still a property tax for some purposes and in some contexts. This is enough to make the tax settlement invalid as applied to Federal securities owned by Appellant.

The minority (Justices Bell, Musmanno and B. Jones) agreed that the State Franchise Tax is a franchise tax for the privilege of doing business in Pennsylvania but they would overrule the prior decisions of this Court holding that it is a property tax, and particularly, *National Biscuit Co. v. Philadelphia*, 374 Pa. 604 (1953)—where the Court held that the Franchise Tax is a property tax in determining whether the tax imposed under a local ordinance duplicated the State Franchise and Corporate Net Income Taxes. The concurring minority agree logically and inexorably that the State Franchise Tax cannot be both a franchise tax and a property tax in the same or different contexts, and; therefore, they conclude that the above cases should be overruled and not be allowed to remain in effect concurrently with the inconsistent decision in this case.

Although the majority now holds that the State Franchise Tax is a franchise tax for the privilege of doing business, they do not overrule or hold to be erroneous other decisions of this Court holding the State Franchise Tax to be a property tax or the "equivalent" of a property tax. As we shall develop hereinafter, it is these inconsistent decisions—on the one hand, the present majority decision and prior decisions holding the franchise tax to be a privilege tax, and on the other hand, the decisions of

this Court in *National Biscuit Co. v. Philadelphia*, 374 Pa. 604 (1953), *Com. v. Union Trust Company of Pittsburgh*, 345 Pa. 298 (1942), and *Arrott's Estate*, 322 Pa. 367 (1936) holding the Franchise Tax to be a property tax or the "equivalent" of a property tax—which violate the immunity of Appellant's investments in United States securities from State taxation. Appellant's contention on this point has been misapprehended and has not been clearly disposed of by the majority Opinion.

This can be demonstrated as follows:

Adverting to *Federal Drug Company v. Pittsburgh*, 358 Pa. 454 (1948) where the City of Pittsburgh mercantile license tax was held not to duplicate the State Franchise Tax on the ground that the "respective impact of the two taxes was on a totally different basis", the City tax being measured by gross volume of business and the State tax being measured by the value of the property of the foreign corporation within the state, the majority in the present Opinion say that the same difference existed between the City of Philadelphia mercantile license tax and the State Franchise Tax in *National Biscuit Co. v. Philadelphia*, 374 Pa. 604 (1953) and that, therefore, it was unnecessary in that case "to refer to the State Franchise Tax as a property tax or to treat it as such". As pointed out in the minority Opinion in the present case (p. 4), this flies in the teeth of the actual basis of the decision in *National Biscuit Co. v. Philadelphia*, supra, which was that the City tax, a tax for the privilege of doing business in Philadelphia was valid because it did not duplicate State property taxes—franchise, capital stock and corporate net income. In that case, the majority Opinion, after stating that the capital stock tax, the foreign franchise tax and the corporate net income tax "have been held many times to be property taxes" (p. 612) went on to say (p. 614):

> "We hold, therefore, that corporations otherwise subject to the city mercantile license tax are *not ex-*

empt therefrom by reason of the provisions of the Sterling Act *merely because they pay property taxes to the Commonwealth.*" (Emphasis supplied.)

See, also, Appellant's Brief, pp. 19-23. The ruling by (a majority of) the Court in that case that the State Franchise Tax is a property tax was not obiter dictum but was the basis of the decision. Furthermore, even though it were possible to have decided that case on a different basis, it was not so decided. The majority opinion in the present case does not overrule the decision in that case which is, therefore, still inconsistent with the majority Opinion in the present case.

In the *Murray* case, 364 Pa. 604 (1950) the Court in an unanimous opinion applied the "realities" test rather than the "nomenclature" test to determine whether the tax imposed by the Philadelphia ordinance on the net income of corporations and on corporate dividends duplicated state taxes. The Philadelphia tax, which was determined to be a property tax, was held to be invalid because it duplicated the State Capital Stock, Corporate Net Income and Franchise Taxes which were found to be property taxes. In support of its findings that the State Franchise Tax is a property tax, the Court cited and relied upon the cases of *Arrott's Estate,* supra, and *The Union Trust Company,* supra. In those two cases it was found by the Court that the franchise tax is the equivalent of and embraces the same elements as the capital stock tax.

The Personal Property Statute involved in *Arrott's Estate* supra, excepted from tax "shares of stock in any • • • corporation • • • liable to • • • tax on its shares or its capital stock for State purposes • • •, and it was held that since the franchise tax was the equivalent of, or embraced the same elements as, the capital stock tax, it was necessary to exempt from the tax, shares of foreign corporations in order to avoid double taxation.

The Statute imposing tax on the shares of trust companies involved in the *Union Trust Company* case, supra, excluded from the determination of the taxable value of the shares so much of the capital stock, surplus and undivided profits "as is not invested in * * * capital stock of corporations liable to pay to the Commonwealth a capital stock tax". The rule of the *Arrott's* case was extended in the *Union Trust Company* case to exclude from the taxable value, shares of foreign corporations subject to the franchise tax in order to avoid double taxation.

When the majority in the present case come to the *Murray* case, where the Court held that the franchise tax was a property tax, and seek to reconcile that opinion with the present holding that the State Franchise Tax is a privilege tax, they say that the Opinion in the *Murray* case "* * * quite unnecessarily, went on to say that the Philadelphia tax also collided with the State Franchise Tax because both could be considered property taxes" and that "This assertion rested upon a likening of the franchise tax to the capital stock tax." (See the *Arrott* and *Union Trust Company* cases, supra.) The majority went on to quote with approval from the Opinion in the *Murray* case that the franchise tax has been considered "* * * an excise tax in some contexts, in others * * * a tax on property." They proceeded to point out that in the *Murray* case this Court was considering the concept of the franchise tax in Pennsylvania in passing on the validity of the City tax, whereas, in the present case the concept of the tax is being considered in a direct attack upon the State Franchise Tax. They concluded that the more recent cases of *Commonwealth v. Monessen Amusement Company, Inc.*, 352 Pa. 120 (1945) and *Commonwealth v. Shenango Furnace Company*, 362 Pa. 491, 493 (1949) where the State Franchise Tax was involved directly and was held *not* to be the equivalent of the Capital Stock Tax, "nullify the effect of the statement in *Murray* regarding the equivalence of the franchise tax and the

capital stock tax, or at least limit the scope of the language there employed to cases where a conflict between a challenged local tax and a State tax was in question."

Hence it will be seen that the majority in the present case approve the difference in the determination of the nature of the State Franchise Tax where that tax is referred to in different contexts. They do not hold to be erroneous their rulings in the *Murray, Arrott* and *Union Trust Company* cases that the State Franchise Tax is a property tax, and the decisions in those cases are inconsistent with the majority decision in the present case holding that the franchise tax is a privilege tax.

Appellant contended, based upon the inconsistent decisions of this Court as to the nature of the franchise tax and based upon the difference in determination as to the nature of the franchise tax depending upon the context in which that term was used, that this Court in the present case must exclude its investment in United States securities in the computation of its franchise tax liability. The Court misapprehended this contention and did not clearly discuss or decide it. Appellant's contention on this point may be summarized as follows:

A. *The inconsistent Opinions of the Court as to the nature of the franchise tax violate the immunity of Appellant's investment in United States securities from State taxation.*

If for purposes of determining the validity of local ordinances the franchise tax is a property tax as in the *Murray* case and in *National Biscuit Co. v. Philadelphia*, supra, and, if for purposes of personal property tax in *Arrott's Estate*, and, if for purposes of shares tax in the *Union Trust Company* case, the franchise tax must be regarded as the equivalent of the capital stock tax in order to avoid double taxation, this Court cannot take a lesser

view in respect to Appellant's investment in United States securities in the determination of its franchise tax liability. The State cannot play fast and loose with the delicate problem of taxing United States securities by describing a tax one way for some purposes and another way for different purposes, or reach different interpretations of the nature of the franchise tax depending on whether or not the Commonwealth is a party to the litigation. To do so would "diminish * * * the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith v. Davis*, 323 U. S. 111, 117 (1944). Nor can a State Court "throw tax liability where it chose, * * *", *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 121 (1954).

That the United States Supreme Court has in no way relaxed its enforcement of the immunity of United States securities from State tax is evidenced by its recent decisions in *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey*, 338 U. S. 665, 675 (1949) and in *Society for Savings in the City of Cleveland v. Bowers*, 349 U. S. 143 (1955). In the *Realty Title Insurance* case, the State Courts were uncertain as to the nature of the State Tax. In the *Bowers* case, the State Court's interpretation of the taxing statute appears to be contrary to the provisions thereof. In both cases it was held that, on the basis of the practical effect and operation of the State tax, the tax was a property tax and not a privilege tax and, therefore, the tax violated the immunity of United States securities from State taxation.

The decisions of this Court holding that the State Franchise Tax is a property tax based on the "realities" test are analogous to the *New Jersey Realty Title Insurance* case and the *Bowers* case and, therefore, the franchise tax imposed on Appellant violates the immunity of United States securities from State taxation.

B. *Discrimination against Appellant's investment in United States securities results from the Court's decision.*

If for any reason the State Franchise Tax is a property tax (the cases of *Murray* and of *National Biscuit Co. v. Philadelphia*) or, if the franchise tax is the equivalent of the capital stock tax (*Arrott's Estate* and *Union Trust Company* cases), Appellant's investment in United States securities must be exempted in the computation of its franchise tax liability because a similar exemption is allowed to domestic corporations for the investment in United States securities for capital stock tax purposes (R. 48a, 49a).

If the franchise tax is the equivalent of the capital stock tax, illegal classification results where the same exemption allowed to domestic corporations for investments in United States securities for capital stock tax purposes is not accorded to Appellant for franchise tax purposes. See *Arrott's Estate,* supra, page 373.

The alleged discrimination results in violation of the uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The majority in the present case erroneously states on page 12 of its Opinion that Appellant's basic contention was raised in the cases of *Commonwealth v. Ford Motor Company,* 350 Pa. 236 (1944) and *Commonwealth v. Quaker Oats Company,* 350 Pa. 253 (1944). Those cases were decided prior to the *Murray* case and the case of *National Biscuit Co. v. Philadelphia,* where in applying the "realities" test, the Court found that the State Franchise Tax is a property tax.

It is conceded that, if the decisions of the Court were consistent in holding the State Franchise Tax to be a privilege tax, assets exempt from property taxation would not

need to be excluded from the computation of the franchise tax liability. But that is not the situation in the present case. Here the decisions of the Court are inconsistent, some holding the State Franchise Tax to be a privilege tax and others holding the State Franchise Tax to be a property tax. Under the property tax cases, the *incidence* of the tax is upon Appellant's assets and, therefore, the tax violates the immunity of Appellant's investment in United States securities from State taxation as was held in the *New Jersey Realty Title Insurance Company* case, supra.

The case of *Werner Machine Co., Inc. v. Director of Division of Taxation, Department of the Treasury of New Jersey*, 350 U. S. 492 (1956) is not applicable in the instant case because the New Jersey Statute involved in the *New Jersey Realty Title Insurance Company* case was changed and under the changed statute the New Jersey State Courts were consistent in construing the tax imposed by the Statute to be a franchise tax "for the privilege of having or exercising its corporate franchises in the State".

II. The fact that the majority felt impelled to sustain the Case of National Biscuit Co. v. Philadelphia shows that the Court was mistaken as to the single nature of the tax and the validity of including out of state assets comprised in part of United States securities.

The Court failed to give proper consideration to the fact that the foreign franchise tax provisions are a part of the capital stock tax structure. Section 21(b) of the Franchise Tax Statute substituted a franchise tax for the capital stock tax theretofore imposed on foreign corporations doing business in Pennsylvania. No mention is made of a privilege tax. The tax is imposed upon capital stock at a valuation. Furthermore, in a proviso to Section 21 it is provided that corporations subject to tax under this Sec-

tion "shall not be required to pay any *further* tax on the mortgages, bonds and other securities owned by them • • •" (Emphasis supplied). These provisions of Section 21 make it clear that tax on the capital stock and tax on the property would constitute double taxation and that, therefore, the tax is a property tax.

In *Murray v. Philadelphia*, 364 Pa. 157, the Court said at Page 170:

> "• • • The franchise tax is imposed by the same Act of Assembly that imposes the capital stock tax and was obviously devised to reach the property of foreign corporations as the equivalent of the capital stock tax: • • •".

This is a further indication that the franchise tax is a property tax.

These cases holding the franchise tax to be a property tax were not held to be erroneous and were not overruled in the majority Opinion in the present case.

If the State Franchise Tax is a property tax, then the tax may not be imposed upon Appellant's out of state assets, including its investment in United States securities.

III. The concurring opinion of the minority Justices clearly shows that the majority opinion is mistaken as to the issue decided in National Biscuit Co. v. Philadelphia, and is still refusing to adjudicate consistently the nature of the franchise tax; and, therefore, is guilty of an abuse of judicial power, in violation of due process.

The minority opinion states emphatically that the Court in *National Biscuit Co. v. Philadelphia* held the State Franchise Tax to be a property tax and that this was the basis for upholding the City tax in the *Philadelphia* case. Therefore, the decision in the present case is inconsistent with the Opinion in the *Philadelphia* case holding the State Franchise Tax to be a property tax.

It is true that due process does not require judicial interpretation to remain consistent but *it is still necessary for those retained in effect to be consistent.*

It is well settled that the prohibition of the Fourteenth Amendment to the Constitution of the United States applies to arbitrary action by the Judiciary. *Chicago, Burlington, and Quincy Railroad Company v. Chicago,* 166 U. S. 226, 233-234 (1897), *Ladner et al. v. Siegel,* 298 Pa. 487, (1930). Likewise, it is established that the test of due process is essentially a test of reasonableness. *Santiago v. People of Puerto Rico* (C. C. A. First Circuit), 104 F. 2d 811 (1936).

The right asserted by Appellant in the present case is reasonable adjudication of its tax liability and protection against arbitrary action. We are not concerned here with the power of Courts to reverse themselves, to indulge in error, and to correct and make changes by judicial construction. If in the present case this Court, in acting upon this petition for reargument sustains the franchise tax as a privilege tax, which would be directly opposed to its ruling in *Philadelphia* and prior cases that the franchise tax is a property tax, we would then be concerned here with simultaneous opposite views of the Court, each impeaching the logic of the other and each not overruling the other. Such a situation would not constitute reversal of prior decisions, mere error, or change by judicial construction but would instead, it is respectfully submitted, constitute an intentional ruling without justification, based more on expediency than on sound principles.

It is submitted that the minority in the present case were right in insisting that *National Biscuit Co. v. Philadelphia* and all prior decisions holding the franchise tax to be a property tax be overruled.

So long as this is not done, due process is denied to Appellant.

IV. For reasons assigned by the concurring minority and for reasons assigned in Part III of this Petition, it is respectfully submitted that the case should be reargued on the point as to overruling National Biscuit Co. v. Philadelphia.

In further support of the reasons assigned therein the following additional reason, supporting reargument in the present case, may be assigned:

The local ordinance of the City of Philadelphia, whose validity was challenged in that case, should be held invalid and void under the Sterling Act, if it levied or collected "Any tax on a *privilege,* transaction, *subject* or occupation or on personal property which is now or may hereafter become subject to a State tax or license fee". (R. 79A) (Emphasis supplied).

Since the decision of the Court in the present case holds the franchise tax to be a privilege tax, then the Philadelphia Ordinance is taxing a privilege or subject which is the same as that taxed under the Franchise Tax Statute.

For the reasons stated above, it is respectfully requested that a reargument be granted Appellant by the Court.

Attached hereto are copies of the two Opinions filed in the case.

Order Entered on Petition for Reargument.

Now, Jan. 2, 1958, Petition denied.

Per Curiam.

APPENDIX D.

RELEVANT PARTS OF OPINIONS AND JUDGMENT ENTERED IN RELATED CASE OF NATIONAL BISCUIT CO. v. PHILADELPHIA, (Appeal No. 214), 374 Pa. 604, 98 A. 2d 182.

Argued June 1, 1953. Before STERN, C. J., STEARNE, JONES, BELL, CHIDSEY, MUSMANNO and ARNOLD, JJ.

Appeals, Nos. 196, 214, 215, 216 and 219, from decrees of Court of Common Pleas No. 2 of Philadelphia County, Dec. T., 1952, Nos. 2304, 6974, 7623 and 8371 and March T., 1953, No. 1434, in Equity, in cases of J. Alden Tifft, et al. v. City of Philadelphia, et al., National Biscuit Company v. Same, Household Finance Corporation et al. v. Same, and Gerald W. Caner, et al. v. Same. Appeal, No. 214, decree reversed, reargument refused July 9, 1953; Appeals, Nos. 215 and 216, decree affirmed; Appeal, No. 196, decree affirmed, reargument refused September 30, 1953; Appeal, No. 219, decree reversed.

Bill in equity to enjoin enforcement of mercantile license tax ordinance. Before LEWIS and CARROLL, JJ.

Adjudication filed holding ordinance invalid in its application to corporations. Defendants appealed (Appeals, Nos. 214, 215, 216).

* * *

OPINION BY MR. CHIEF JUSTICE HORACE STERN, June 26, 1953:

The present appeals challenge the validity of an ordinance of December 9, 1952, of the City of Philadelphia and question its applicability to the various taxpayers involved in these proceedings.

It has become a mere platitude to state, what has so often been proclaimed, that courts are concerned, not with the wisdom of legislation, but with the right of the legislative body to enact it,—not with *policy* but with *power*.

The ordinance is entitled in part: "An Ordinance to provide revenue by imposing a mercantile license tax on persons engaging in certain businesses, including manufacturing, professions, occupations, trades, vocations, and commercial activities in the City of Philadelphia." It levies an annual tax on wholesale and retail dealers or vendors, manufacturers and all other persons engaged in business, at the rate of 3 mills on each dollar of the annual gross volume of business transacted. "Gross volume of business" is defined to mean, with certain exceptions, gross receipts, including both cash and credit transactions. "Business" is defined to mean "the carrying on or exercising for gain or profit within the City of Philadelphia of any trade, business, profession, vocation, or making sales to persons within the City of Philadelphia, or of any manufacturing, commercial or financial activity, service or business, including but not limited to manufacturers, brokers, wholesale dealers, or wholesale vendors, retail dealers or retail vendors"; it does not include any employment for a wage or salary. Every person desiring to engage in, or to continue to engage in any business is required to procure a mercantile license for each of his places of business in the City, paying therefor a fee of $3 for each such place.

In the argument on these appeals an attack was made upon this legislation on the ground that the title of the ordinance is constitutionally defective and that the terms of the ordinance itself are vague and uncertain. Those criticisms, however, were apparently not seriously pressed, and, in any event, they do not merit serious discussion. Another complaint urged was that the ordinance does not limit itself to the scope of the usual mercantile license tax because, it is alleged, such taxes have "historically" been imposed only upon merchants, whereas this ordinance

purports to tax also persons otherwise engaged. But, whether that fact be true or not, it is certainly wholly irrelevant because the sole question is whether the City has the power to impose the tax upon such "additional" persons and not whether preceding acts or ordinances have included them.[1] Moreover, the ordinance itself provides that if the tax, or any portion thereof, which it imposes shall be held by any court of competent jurisdiction to be in violation of any constitutional or statutory provisions, as applied to any person, such decision shall not affect or impair the right to impose the tax, or the validity of the tax so imposed upon other persons as therein provided. Even if, therefore, it should be adjudged that the tax cannot validly be applied to any particular person or persons that would not affect or impair the validity of the ordinance as to those properly subject thereto. Accordingly, it is clear that the ordinance, as such, is a valid enactment, and that the only questions requiring consideration are those concerning its applicability to persons which it assumes to tax who are engaged in certain types of business, professions, occupations, and financial activities.

The Act of August 5, 1932, special session 1932, P. L. 45, being the so-called "Sterling Act," gave authority to the council of any city of the first or second class,[2] for general revenue purposes, to levy, assess and collect such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city, as it should determine, except that such council should

1. Incidentally it is of interest to note that the Acts of May 23, 1949, P. L. 1669, and May 10, 1951, P. L. 265, imposing a similar tax for the purpose of providing revenue for school districts of the first class, are in fact almost as broad as the present ordinance and define "business" and "financial business" in nearly the same language. Also, in the Pittsburgh mercantile license tax which was the subject of discussion in *Federal Drug Co. v. Pittsburgh*, 358 Pa. 454, 57 A. 2d 849, liability was extended even to persons conducting or operating places of amusement, including theatres, motion picture houses, billiard and pool rooms, baseball and football fields, and a large number of other such places.

2. The Act provides that as to cities of the second class it should remain in force only until June 1, 1935.

not have authority to levy, assess and collect any tax on a privilege, transaction, subject or occupation, or on personal property, which then was or might thereafter become subject to a State tax or license fee. While, therefore, this statute vested in the council of the City of Philadelphia an enormously broad and sweeping power of taxation, that grant was attended by the important limitation that no tax could be thus imposed if it duplicated the State's own imposition of a tax or license fee.[3] Because of that limitation National Biscuit Company, one of the present appellees, claims exemption from the City tax because, as a corporation, it pays annually to the Commonwealth a corporate net income tax under the Act of May 16, 1935, P. L. 208, as reenacted and amended, and, as a foreign corporation, a franchise tax under the Act of June 1, 1889, P. L. 420, as amended, and also, to the School District of Philadelphia, an annual tax on gross receipts under the Act of May 23, 1949, P. L. 1669, as reenacted and amended.

* * *

The court below held that because of these various payments all of these appellees were relieved from payment of the City tax. We are not in accord with this conclusion.

In the first place, as far as the payments made to the School District of Philadelphia are concerned, it is sufficient to say that in *McClelland v. Pittsburgh*, 358 Pa. 448, 57 A. 2d 846, we held that a tax imposed for the benefit merely of a local political subdivision, and not for general State purposes, is not to be regarded as a State tax within the meaning of that term in the "Tax Anything" Act of June 25, 1947, P. L. 1145, which, as previously stated, contained a limitation on the authority of the municipal legislative body similar to that embodied in the Sterling Act. This ruling was followed in *Federal Drug Co. v. Pittsburgh*, 358 Pa. 454, 57 A. 2d 849.

3. Similar power was subsequently granted by the so-called "Tax Anything" Act of June 25, 1947, P. L. 1145, as amended, to the duly constituted authorities of certain other political subdivisions of the Commonwealth, but with somewhat greater limitations than those contained in the Sterling Act.

In the second place, as to the payments made to the Commonwealth of capital stock taxes, corporate net income taxes, foreign corporation franchise taxes, and taxes on net earnings or income, it need merely be pointed out that all those taxes have been held, many times, to be property taxes. In an opinion by Mr. Justice LINN, who cited many previous authorities so holding, the capital stock tax was again declared in *Murray v. Philadelphia,* 364 Pa. 157, 166, 71 A. 2d 280, 284, to be a tax on the property of the corporation, and so likewise (following *Blauner's Inc. v. Philadelphia,* 330 Pa. 342, 198 A. 889, and *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79) the corporate net income tax (p. 169, A. p. 286), the franchise tax (p. 170, A. p. 286), and (following *Kelley v. Kalodner,* 320 Pa. 180, 187, 181 A. 598, 601) a tax on net earnings or income (p. 175, A. p. 289). On the other hand, the authorities are equally numerous to the effect that a mercantile license tax is not a tax on property or income, but an excise tax upon the privilege of transacting business measured by the gross volume of business annually transacted: *Knisely v. Cotterel,* 196 Pa. 614, 46 A. 861; *Commonwealth v. Harrisburg Light & Power Co.,* 284 Pa. 175, 130 A. 412; *Commonwealth v. Globe Furnishing Co.,* 324 Pa. 180, 188 A. 170; *Commonwealth v. McKinley-Gregg Automobile Co.,* 345 Pa. 544, 28 A. 2d 919; *Commonwealth v. Bailey, Banks & Biddle Co.,* 20 Pa. Superior Ct. 210; *H. J. Heinz Co. v. School District of Pittsburgh,* 170 Pa. Superior Ct. 441, 87 A. 2d 85. Since clearly, therefore, a mercantile license tax is not a duplication of any of the property taxes paid by appellees to the Commonwealth, the City of Philadelphia is not prohibited by reason of any limitation on its power contained in the Sterling Act from imposing such a tax on corporations otherwise subject thereto. Indeed it was definitely so decided in *Federal Drug Co. v. Pittsburgh,* 358 Pa. 454, 57 A. 2d 849, where the mercantile license tax imposed by an ordinance of the City of Pittsburgh was upheld; it was there concisely and categorically

stated in an opinion by Mr. Justice ALLEN M. STEARNE, speaking for a unanimous court, that a mercantile license tax did not duplicate or conflict with either the corporate net income tax or the foreign corporation franchise tax. The court below was of the opinion that this holding in the *Federal Drug* case was overruled, or at least impaired, by the decision in the *Murray* case. Nothing could be further from the truth. The ordinance held invalid in the *Murray* case attempted to tax dividends received by persons on shares of stock in corporations paying these various property taxes, and it was held that, since such dividends represented merely a distribution of the net income of the corporation, a tax thereon was a *property* tax and therefore a duplication of the property taxes paid by the corporation to the Commonwealth. What was held in the *Federal Drug* case was that, the mercantile license tax *not* being a property tax, it was *not* a duplication of the property taxes paid by the corporation. An analysis of the two cases makes this distinction entirely clear and there is not the slightest basis for the contention that they are other than in complete accord.

We hold, therefore, that corporations otherwise subject to the city mercantile license tax are not exempt therefrom by reason of the provisions of the Sterling Act merely because they pay property taxes to the Commonwealth. But these appeals require careful consideration of claims to exemption from the tax imposed by the City ordinance based on another reason than that heretofore discussed, namely, the payment to the Commonwealth of alleged "license fees," the Sterling Act providing that the council of the city shall not have authority to levy a tax on a privilege, transaction, subject or occupation "which is now or may hereafter become subject to a State tax or *license fee*".

* * * *

(Discussion re license fee point omitted as irrelevant to present appeal.)

ORDER

In Appeal No. 214 January Term 1953, the decree of the court below is reversed at the cost of appellee.

* * *

OPINION BY MR. JUSTICE ALLEN M. STEARNE, CONCURRING IN PART AND DISSENTING IN PART:

I concur in the illuminating opinion of the Chief Justice as to the validity of the ordinance. The sole concern of this Court is the *power* of the City Council to make and enforce enactments. With the wisdom of the ordinance we are not judicially concerned.

I dissent, however, in Appeal No. 196 of J. Alden Tifft et al., Insurance Agents and Brokers.

* * *

(Discussion of Tifft and other appeals involving license fee question omitted as irrelevant to this appeal.)

OPINION BY MR. JUSTICE BELL CONCURRING IN PART AND DISSENTING IN PART:

The Sterling Act prohibits the City of Philadelphia from levying or collecting "any tax on a *privilege*, transaction, *subject* or occupation or on personal property which is now or may hereafter become subject to [1] a state tax *or* [2] a *license fee.*"*

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* Italics throughout, ours.

The Chief Justice has ably expounded the law with respect to the meaning of the words "license fee" as used in the Sterling Act. I agree with his construction of this licensee fee prohibition and of the application thereof to the cases of *The Philadelphia Saving Fund Society, The Western Saving Fund Society, The Beneficial Saving Fund Society,* and *The Saving Fund Society of Germantown; Household Finance Corporation, Household Consumer Discount Company, Caner, et al., Tifft, et al.,* and *National Biscuit Company.* However, I disagree with the majority opinion so far as it deals with corporations which pay to the State of Pennsylvania a corporate net income tax.

As recently as 1950 this Court flatly and unanimously decided in *Murray v. Phila.,* 364 Pa. 157, 71 A. 2d 280, that the Sterling Act prohibited Philadelphia from levying a tax on the net profits or net income of (every person, including) a corporation, domiciled in Philadelphia because the State taxed (when we look beneath the form and surface to the substance, i.e., to the realities) the net income of a corporation. We there said: "In construing the Act, it is immaterial that state taxes have been referred to as excise or franchise taxes or by any other adjective; *the reality controls. The fact that this tax* [the corporate net income tax] *is paid to the state conclusively shows that the city has no jurisdiction to tax the corporate income.*"

In 1953 (when we look beneath the form and surface to the substance or realities) we find that the present Philadelphia Ordinance unquestionably and without the slightest doubt taxes the gross (or in the alternative, the net) income of a corporation; but because the ordinance calls the tax by a different name, *the same tax* that was declared invalid 3 years ago is now sustained by a majority of this Court. How unrealistic can we be?

But even if we close our eyes to reality and assume that this Philadelphia Ordinance does not, in reality and in its

operations and practical effect, impose an income tax on corporate income, but merely an "excise" tax for the privilege of doing business (measured by the corporate income) the City is still prohibited because, irrespective of what the City tax is called or is determined to be, *it is a replica of* and identical with the corporate net income tax and consequently taxes the *same "privilege"*, i.e., the privilege of doing business in Philadelphia, *and the same subject*, i.e. *corporate income*, as the State does. This fundamental fact was overlooked by the majority opinion which became enmeshed in attempting to distinguish "excise" taxes from "property" taxes, and fell into the basic error of adopting and applying one test for the Act, i.e., the "realities" test, and an entirely different test, i.e., the nomenclature test, for the Ordinance.

In order to determine whether the City is attempting to tax a "privilege" or a "subject" which has already been taxed by the State and is therefore prohibited, we must first examine the legislative intent as disclosed by the Sterling Act, the Corporate Net Income Tax Act, and by the City Ordinance.

The Corporate Net Income Tax Act by its very terms is "An Act to provide revenue . . . *by imposing an excise tax* . . . on the net *income* of certain corporations. . . ." What for? ". . . *for the privilege* of doing business in this Commonwealth." The City Ordinance by its very terms is "An Ordinance to provide revenue by imposing a mercantile license [excise] tax on persons . . . any individual, partnership, association or corporation engaging in certain businesses including manufacturing, professions, occupations, trades, vocations. . . ." What for? For the privilege of doing business in Philadelphia. What is the tax imposed? ". . . on the gross receipts [gross income] of persons, including certain corporations, engaging in certain businesses in the City of Philadelphia." If, so far as corporations are concerned, that isn't a duplication of both "privilege" and "subject", each of which is banned by the

Sterling Act, then the word "duplication" no longer has any meaning in our language.

The Ordinance, which it is frankly admitted is intended to produce $17,000,000. annually, further provides, in imposing a 3 mills tax on each dollar of the annual gross volume of business, that "'Gross Volume of Business' means *gross receipts* and shall include both cash and credit transactions . . . or . . . In the Alternative at the option of the [taxpayer] at the rate of two (2) per centum of the annual gross volume of business transacted by such person *less the cost of goods and less the cost of labor.* . . ." This unquestionably means in the case of a corporation, 3 mills on the corporate gross income or 2% of *the corporate net income.* When it is realized that this tax is imposed upon virtually every person, partnership, manufacturer, profession, trade and corporation engaged in business in Philadelphia, it is clear to every layman and, I believe, to every careful analyst, that the tax is in reality and actuality not a genuine mercantile license tax, but a *gross income tax* (or, in the alternative, a net income tax) *on* individuals and *corporations* engaged in business in Philadelphia. The words "mercantile license tax" are obviously a misnomer. If the City frankly, openly and undisguisedly imposed a tax on corporate gross or net income, but called it a mercantile license tax, could anyone justifiably contend that such a tax was not prohibited by the Sterling Act and by *Murray v. Phila.*, 364 Pa., supra? Yet that, in effect and in reality, is exactly what the City has done in and by its present ordinance.

Murray v. Phila. reiterated the law that "the *practical operation of the two taxes is controlling*"; and the city's power to tax must be strictly construed against the city. Nevertheless, the majority opinion, after holding that the corporate net income tax, in spite of calling itself an "excise" tax, is in reality a "property" tax, completely ignores the aforesaid legal principles and holds that the City tax which uses identical language with the Act is an "excise"

tax and is not a tax on the income of a corporation. I repeat: How unrealistic, how impractical can we be?

Let's examine a little more closely just what the Philadelphia Ordinance attempts to tax and what is the practical operation of this City tax upon corporate income. The Ordinance first "apes" the historical mercantile license tax by taxing dealers and vendors at the rate of 3 mills on their gross volume of business or *gross receipts*, which are defined to be one and the same. It then immediately shows its real nature and true colors by taxing every manufacturer, every corporation, and, with a few exceptions, every person engaged in business in Philadelphia 3 mills on the annual gross (receipts or) income, or in certain cases alternatively, 2% on their net income. This is not a real or true or genuine mercantile license tax on vendors, dealers or merchants for the privilege of selling goods, wares or merchandise or engaging in kindred businesses as are most, if not all, of the genuine mercantile taxes imposed by municipalities under the "Tax Anything Act". This is, we repeat, in reality and in its practical operations and effect, a thinly disguised gross (or, in the alternative, net) tax on income of (inter alia) corporations falsely and ingeniously masquerading as a mercantile license tax. Labeling poison as chocolate does not and will not make it chocolate. Nomenclature, labels and technical distinctions are of relatively little weight in determining what a tax really is; *realities control the determination: Murray v. Phila.*, 364 Pa., supra; *Arrott's Estate*, 322 Pa 367, 185 A. 697; *Armour & Co. v. Pittsburgh*, 363 Pa. 109, 69 A. 2d 405. This corporate income is exactly what the majority say is taxed by the State in the Corporate Net Income Tax and this is specifically what is specifically prohibited in and by the Sterling Act: *Murray v. Phila.*, 364 Pa., supra.

The majority opinion assumes that this City tax is a real mercantile license tax in spite of the fact that it taxes nearly every man, woman, child, profession, partnership and corporation doing business in Philadelphia, and asserts

that such a tax is technically *an excise tax*, and the corporate net income tax is technically *a property tax* and therefore there is no duplication. Whether we approach this question from a technical or a non-technical point of view is immaterial, for irrespective of whether the corporate net income tax is denominated or is held to be an excise tax or a property tax, if the Commonwealth imposes a tax on a corporation for the privilege of doing business, the City is prohibited from imposing a tax on a corporation for the privilege of doing business, or if the State imposes a tax on the same (property or) subject which the City attempts to tax, i.e., income of a corporation, the City's tax is clearly and specifically prohibited by the Sterling Act.

The only distinction between the Act and the Ordinance is that the City's measuring rod or tax is *gross* as distinguished from *net* income of corporations. This does not constitute a distinction in the privilege or subject or nature of the tax, but merely makes the tax more onerous and unjustifiable. A study of the Act and of the Ordinance demonstrates that they are twin brothers; and whatever the corporate net income tax is determined to be, *the City tax is exactly the same.*

When the legislature prohibited Philadelphia from taxing any *"privilege"* or any *"subject"* which was taxed by the State, in order to preserve the sources of the State's income, they were not talking Greek—they were not thinking of what was or was not an excise tax, or what was or was not a property tax which even this Court cannot consistently determine—they were talking plain, clear English which every member of the legislature and at least every layman could understand. When the Supreme Court vacillates from one case to another as to whether the corporate net income tax is an excise tax or a property tax, it would seem unreasonable to hold that the legislature was referring to these taxes when it used the words "privilege" or "subject."

The majority opinion says that the corporate net income tax* and capital stock taxes and taxes on net earnings have been held many times to be property taxes. This Court in the very recent case of *Murray v. Phila.*, 364 Pa. (1950), without overruling or even discussing the cases which held to the contrary, decided that the corporate net income tax is a "property" tax; and that the Philadelphia Ordinance which *imposed, openly and without subterfuge, income taxes* on various persons and corporations in Philadelphia was *invalid* because it was prohibited by the Sterling Act. This Court could reach such a conclusion only by looking below the surface into the "realities". Looking at the realities, this Court squarely decided, inter alia, that under the Sterling Act the City of *Philadelphia has no power (a) to tax the income of a domestic corporation* which pays a capital stock tax or a corporate net income tax to the state; or (b) to tax the income of a foreign corporation which pays a franchise tax to the state, because a franchise tax is the equivalent of a capital stock tax for domestic corporations; or (c) to tax the net income of a credit union; or (d) even to tax a dividend in the hands of a shareholder which was received from a corporation which pays corporate net income taxes to the state; or which was received from a foreign corporation which pays a franchise tax to the state, or which was received from a state bank or a national bank; and (e) has no power to tax income from bonds in the hands of a bondholder which was received

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* So far as corporate net income tax is concerned, this Court more frequently held that it was an excise tax for the privilege of doing business in Pennsylvania. See: *Com. v. Curtis Publishing Co.*, 363 Pa. 299, 69 A. 2d 410; *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 184 A. 37; *Com. v. Warner Bros.*, 345 Pa. 270, 27 A. 2d 62; *Com. v. Electrolux Corp.*, 362 Pa. 333, 67 A. 2d 105; *Com. v. Bayuk Cigars Co.*, 345 Pa. 348, 28 A. 2d 134; *Com. v. Columbia Gas & Elec. Corp.*, 336 Pa. 209, 8 A. 2d 404. The distinction or line of demarcation between a privilege tax, an excise tax and a property tax, which in the last analysis must be determined by the incidents and the nature and legal effect of the Act rather than by the name by which it is described, is so nebulous, flexible and fluctuating, that the decisions on this point throughout the entire country are ofttimes vacillating, confused and contradictory. See: 53 C. J. S., Licenses, pp. 457-461.

from a corporation which pays a corporate loans tax to the state; and (f) has no power to tax income from real estate.

It clearly follows, if the realities of the Philadelphia tax are analyzed and carefully considered, that the City's so-called mercantile license tax is in reality and in its operation and practical effect, not a mercantile license tax, but a tax upon the income of every person and every corporation engaged in business in Philadelphia and as to said corporations is absolutely invalid.

The effect of the majority opinion will, in my judgment, open wide the door to many taxes which have heretofore been held invalid and will make meaningless and nullify many of the provisions of the Constitution. For example, if the Constitution or a statute prohibits the taxing of a particular subject, all a municipality or a legislature has to to do is to call the tax a mercantile license tax or an excise tax and then measure it by the prohibited subject. Could anything show more clearly the basic weakness of the majority opinion or the dire results which can flow therefrom?

Mr. Justice MUSMANNO joins in this Opinion.

Section 1 of the Act of August 5, 1932 Ex. Sess., P. L. 45, 53 Purdon's Pennsylvania Statutes § 4613, known as the "Sterling Act".

"Section 1. Be it enacted, &c., That from and after the effective date of this act, the council of any city of the first or second class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first or second class, as it shall determine, except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment

and collection of, any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee. If, subsequent to the passage of any ordinance under the authority of this act, the General Assembly shall impose a tax or license fee on any privilege, transaction, subject or occupation, or on personal property, taxed by any city of the first or second class hereunder, the act of Assembly imposing the State tax thereon shall automatically vacate the city ordinance passed under the authority of this act as to all taxes accruing subsequent to the effective date of the act imposing the State tax or license fee. It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon any and all subjects of taxation which the Commonwealth has power to tax but which it does not now tax or license, subject only to the foregoing provision that any tax upon a subject which the Commonwealth may hereafter tax or license shall automatically terminate upon the effective date of the State act imposing the new tax or license fee."

Relevant Provisions of Philadelphia City Ordinance Approved by Mayor Dec. 9, 1952.

AN ORDINANCE

To provide revenue by imposing a mercantile license tax on persons engaging in certain businesses, including manufacturing, professions, occupations, trades, vocations, and commercial activities in the City of Philadelphia; providing for its levy and collection; providing for the issuance of mercantile licenses, conferring and imposing powers and duties on the Department of Collections and on the Department of Licenses and Inspections; and imposing penalties.

The Council of the City of Philadelphia hereby ordains:

SECTION 1. Definitions.

(a) "Person" means any individual, partnership, association, or corporation. Whenever used in any clause prescribing or imposing a penalty, the term "Person" as applied to associations shall mean the partners or members thereof, and as applied to corporations, the officers thereof.

• • •

(d) "Manufacturer" means any person who sells goods, wares and merchandise of his own growth, or production.

(e) "Business" means the carrying on or exercising for gain or profit within the City of Philadelphia of any trade, business, profession, vocation, or making sales to persons within the City of Philadelphia, or of any manufacturing, commercial or financial activity, service or business, including but not limited to manufacturers, brokers, wholesale dealers or wholesale vendors, retail dealers or retail vendors.

• • •

(h) "Gross Volume of Business" means gross receipts and shall include both cash and credit transactions.

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SECTION 3. Imposition and Rate of Tax. Every person engaging in any of the following businesses in the City shall, in addition to paying a license fee, as herein provided, pay an annual mercantile license tax for the license year 1953 and annually thereafter at the rate set forth:

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(c) (1) A manufacturer at the rate of three (3) mills on each dollar of the annual gross volume of business transacted by such person, or,

(2) In the alternative, at the option of the manufacturer at the rate of two (2) per centum of the annual gross volume of business transacted by such person less the cost of goods and less the cost of labor.

(d) (1) A manufacturer who sells also at retail at the rate of three (3) mills on each dollar of the annual gross volume of wholesale business transacted by such person and three (3) mills on each dollar of the annual volume of gross retail business transacted by such person, or,

(2) In the alternative at the option of the manufacturer who sells also at retail at the rate of two (2) per centum of the annual volume of gross wholesale business transacted by him, less the cost of goods and less the cost of labor, and at the rate of three (3) mills on each dollar of the annual volume of gross retail business transacted by such person.

(e) All other persons engaged in business at the rate of three (3) mills on each dollar of the annual gross volume of business transacted.

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